

**PROCEDURAL FAIRNESS AND THE PRIVATIZATION OF PUBLIC SERVICES:
A CASE STUDY OF THE STREET LIGHTING CONTRACT BETWEEN NAIROBI CITY COUNCIL AND ADOPT-A-LIGHT LIMITED**

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THIS THESIS IS SUBMITTED IN PARTIAL FULLFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS IN THE FACULTY OF LAW, UNIVERSITY OF NAIROBI.

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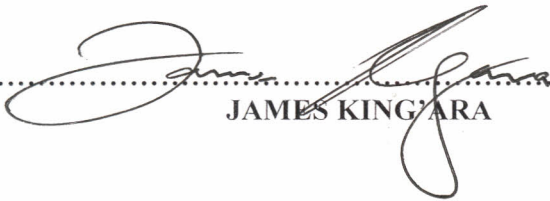


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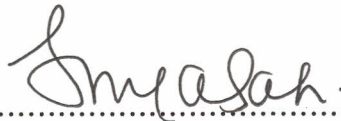
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As I complete this thesis, I thank God for giving me the strength, resources and fortitude to accomplish it. To Him be the glory.

JAMES KING'ARA

NAIROBI
DECEMBER, 2006

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5. The Local Government Act, Chapter 265 of the Laws of Kenya.
6. The Companies Act, Chapter 486 of the Laws of Kenya.
7. The Exchequer and Audit Act, Chapter 412 of the Laws of Kenya.
8. The Streets Adoption Act, Chapter 406 of the Laws of Kenya.
9. The Competition and Service (Utilities) Act 1992, United Kingdom.

INTERNATIONAL INSTRUMENTS

1. The European Convention on Human Rights.
2. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services.

ABSTRACT

The aim of this project is to interrogate, by way of a case study, the degree or lack thereof of procedural fairness in the course of privatization of public services in Kenya. The project will seek to investigate the rationale and pivotal importance of due process in the privatization of public services and in particular from the viewpoint that privatization of public services invariably involves the exercise of decisions that will ultimately impact on the individual citizen. The accountability deficits and benefits that may accompany such privatization especially in light of the traditional avenues for legal redress such as judicial review for an individual citizen who has been injured by processes relating to discretionary exercise of legal powers will also be delved in to, and the findings there from juxtaposed with the current legal regime on privatization in Kenya. Secondly the issue of procedural fairness as a methodic concept of democracy will also be investigated in light of the case study.

Finally, proposals by which the law can be enlisted to play a pivotal and effective role in ensuring the cognizance and incorporation of due process in the area of privatization of public services will be proffered.

BACKGROUND TO THE PROBLEM

Neo-liberal economic analysts and international agencies such as the International Monetary Fund and the World Bank have robustly advocated for privatization of public services as a solution to help developing countries overcome some of the basic problems associated with governance.¹ The culmination of these policies has often translated into increased pressure on the part of government or public agencies in developing countries to consider or even implement policies geared towards the transfer of public functions to private entities.²

Provision of public services to private entities by way of contracting out such services is founded on the popular argument that the private sector is more efficient in providing services to the citizens than the government.³ The criticism usually stems

¹ See for example Caiden, Gerald E, 1991. *Administrative Reform Comes Of Age*. Berlin and New York: Walter Gruyte.

² Ibid.

³ Michael J. Trebilcock, "*The Role of Institutional Capital in Economic Development What makes Poor Countries Poor?*" in Buscaglia, E. et al eds. *The Law of Economics and Development* (Connecticut: JAI Press, 1997 p54

from the poor performance of public enterprises in terms of economy and profitability in the provision of public services.⁴

Despite the argument, fundamental questions have arisen as to the broader legal implications wrought by the contracting out of public services to private entities.⁵

While on a superficial plane it may be possible to list a number of benefits that could accrue from a move towards privatization of the provision of public services, there are, upon a more critical examination serious side effects of a juridical nature that are often widely ignored in the privatization discourse.⁶

Most of the implementing agencies, including governments in developing countries are often oblivious of these shortcomings in the privatization process with the result that the privatization of public services far from creating effective and efficient service delivery platforms often leads to more unfavourable outcomes for these countries and the state of the services offered end up being worse than before.⁷

It is against this background that the contracting out on an single-sourcing basis, of a public service in the sense of installation and maintenance of street lighting infrastructure with the additional benefit of using the said infrastructure as an advertisement medium within the City of Nairobi by the Nairobi City Council to a private entity, Adopt-A- Light Limited can be traced.

Several issues therefore arise from the foregoing.

- What factors should inform the contracting out by public entities of public services to private entities?
- What factors from a legal perspective ought to be considered in the process of contracting out of such public services to private entities?

⁴ Heracleous, Loizos: "State Ownership, Privatization and Performance in Singapore: An Extraordinary Study from a Strategic Management Perspective", Asia Pacific Journal of Management, Volume 18, Number 1, Springer, Singapore, March 2001, 69-81

⁵ Ahmed Shafiqul Huque, *Competition, Contracts and Privatization: Global and Public Administration in Developing Countries* (Institute for Globalization and the Human Condition, McMaster University, Hamilton, Ontario Canada at <http://www//strange.mcmaster.ca/global Articles/ articleback/Huque.xmi> p.13 last visited on 7th April 2006.

⁶ Ibid 14.

⁷ Ibid

- How effective are the legal and regulatory frameworks that are ostensibly crafted to regulate the conduct of private entities upon their assumption of public services?
- What implications does the whole notion of privatization of public services have on other vitally important legal issues that are engendered by the very act of privatization?

STATEMENT OF THE PROBLEM

The present study investigates the accountability deficits likely to be occasioned to the individual citizen in the event that due process is not entrenched and observed in the privatization of public services with a view to extending proposals on how the law can play a more effective role in inculcating procedural fairness in the process.

THEORETICAL FRAMEWORK

The ultimate goal of responsive law should be to foster qualities of good administration and respect for fundamental public interest values such as consumer welfare within all regulated agencies and bodies engaged in the provision of services to citizens.⁸

Without procedures, law and legal institutions would fail in their purposes. And since law is both necessary and desirable in achieving social goals, procedures are also necessary and must be seen as equal partners in that enterprise. For whatever the context, whether the judicial trial, the administrative decision, or any other form of legal process, procedures are necessary to ensure that the issue is channeled to its right conclusion.⁹ Thus the maxim often quoted by lawyers that justice should not only be done, but should be seen to be done is really an expression of the centrality of procedures in the administration of legal decisions and also of the fact that we must have confidence in them.¹⁰

⁸ Peter Vincent-Jones, *Citizens Redress in Public Contracting for Human Services, Volume 68(6) The Modern Law Review*, Blackwell Publishing Oxford November 2005

⁹ Galligan D.J., *Due Process and Fair Procedures: A Study of Administrative Procedures* Clarendon Press, Oxford 1996 at 4

¹⁰ *Ibid* at 72

Legal and administrative processes are different from other kinds of social processes in that they are made under the authority of legal standards, which define and set limits to the scope of authority. It is also characteristic of such processes that other legal standards normally stipulate the criteria for exercising such authority.¹¹

Jeremy Bentham, the eminent English jurist postulated that in any legal process, especially one that is likely to involve an individual person, authoritative legal standards must be stipulated mapping out how the matter should be dealt with.¹² Those standards in turn ought to be applied to the legal decision making process in order to ensure that such decision is guided and constrained towards a reasonable outcome.¹³

Procedures are the means to fair treatment and fair treatment lies in fair procedures.¹⁴ The effect of provision of public services by private entities undertaken in an environment that is marked by amorphous procedures has arguably been to undermine the legal protection of both the public interest in good administration, and the more particular interests of individual citizens directly affected by such decisions or the quality of the services respectively.¹⁵

Secondly, and perhaps more critical is the question of the erosion of public and administrative procedures which serve as instruments of control and accountability and which concepts emanate from the democratic process.¹⁶ The underlying purpose of accountability is found in the principles of democracy, the rule of law and effective and good governance. In that sense accountability has an instrumental value in serving democratic procedure in public governance. In other words, accountability has a procedural character which is inspired by the methodic concept of democracy and in that vein public administration should reflect such a procedural value to produce effective and fair outcomes to the public which in turn secures the legal, moral and rational justification for decisions and policies made by public authorities.¹⁷

It is the intention of this study to interrogate the degree to which fundamentals of procedural fairness in the context of the above contexts have been applied in the case under investigation and in the event that the same are lacking to forecast the likely

¹¹ Ibid at 8

¹² Ibid

¹³ Twining W, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld, London, 1986) at 23

¹⁴ Galligan (n.10 above).

¹⁵ Peter Vincent Jones (n.9above) at 888

¹⁶ Zarei Mohamed H. *Asian Review of Public Administration*, Volume XII, No. 2(July-December 2000) at 40

¹⁷ Ibid

outcomes from an accountability perspective with a view to proffering legal solutions to those outcomes in light of the existing privatization law regime in Kenya.

Successful market economies have progressively installed within their basic legal frameworks provisions that take into cognizance the importance of the individual citizen's access to procedural fairness not only in the settlement of issues between two private parties, but also in administrative processes where decisions are made by public officials about private parties.¹⁸ To that extent it is arguable that administrative processes in the area of privatization that are executed in observance of procedural fairness may, all things being equal, enhance the degree of success of such processes.

It will be argued in this work that the inculcation and effective application of the same principles of procedural fairness and due process would result in similar positive outcomes in the context of privatization of public services in Kenya.

Given the pivotal role of public services in the overall market activities in developing countries¹⁹ the importance of applying procedural fairness principles in these markets, particularly where provision of services of a public nature are concerned is self-evident if any sustainable outcomes are to be engendered by the whole privatization process.

Ancillary to the aforesaid question of procedural due process is the often-intertwined issue of the individual citizen's redress. Accountability deficits arising from the privatization process are often likely to occur from the fact that the individual citizen as a consumer of the privatized services is prevented from suing the service provider in contract due to lack of privity and or consideration. On the other hand the traditional redress available to the citizen by way of judicial review may also not be applicable on the basis that such legal redress relates to the actions of public bodies or their officers.²⁰

¹⁸ See Article 6(1) of The European Convention on Human Rights, which states: "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Under the Threshold Test, this has been interpreted to include the right to a fair hearing by an administrative decision.

¹⁹ See J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in The Administration of Aid* (37 NYU Journal of International law & Politics) New York 2005 at 1

²⁰ Peter Vincent Jones (n.17 above) at 900

Although legislation germane to privatization of public services in Kenya is now in place²¹ the same is at its nascent stage and there is yet to be established a coherent body of jurisprudence in respect to matters under its scope and in particular on matters to do with procedural fairness and individual citizen's redress arising from the privatization process.

It is the intention of this study to evaluate the degree to which these legislative provisions, particularly in light of the case study at hand, have incorporated procedural fairness and the individual citizen's redress in the process of provision of public services by private entities.

While global solutions may not be feasible, it is arguable that appropriate regulatory reforms could play a useful role in ensuring a degree of equity and fairness in the process of privatizing public services thus ameliorating the negative outcomes that may result from an un-regulated process.

Reform of the privatization process can be addressed at three levels.

On the one hand there is a case for a clearly defined government policy that mirrors and articulates the consuming public's views on the intended privatization. Such views should be preceded by full disclosure and provision of relevant information to the public by government or the relevant public entity on what public services are open to privatization to private entities.

Secondly in the event of privatization of such services, clear legislative guidelines to map out the entire process should be formulated on the core basis of ensuring the highest degree of procedural fairness and ultimately the most reasonable administrative decisions in the circumstances.

Thirdly the role of the courts and other privatization-related tribunals in the development of a coherent and credible jurisprudence in the field of privatization whose cumulative effect is to ensure meaningful accountability and regulation of the privatization process cannot be understated.

It will be argued in this paper that in the absence of such legal reforms, then the negative outcomes arising from the non-application of pre-determined procedural standards in the privatization of public services will undoubtedly afflict the whole process.

²¹ The Privatization Act

LITERATURE REVIEW

Several authors, often with different views, have written on the privatization of public services and more specifically from the perspective of the procedural aspects. The writings of D.J. Galligan²² in particular set out an excellent treatise on the issue of procedure and due process and reveal the pivotal role of these principles in the whole decision making process. The author also provides an insight into the traditional position in English law with regard to requirements for procedural fairness together with the remedies available to an aggrieved person in the event of breach of the same.

Wade and Forsyth have argued that natural justice or procedural fairness mirrors the idea that a public official cannot be the judge of his or her own course and that, before making a final decision affecting a person or group's rights and interests, a defense of their case and views must always be fairly heard.²³

Zarei Mohamed²⁴ provides a clear explanation behind the significance of procedural fairness as to provide a level of protection for those individuals or groups who think that their rights and interests have been undermined through the administrative decision-making processes. A degree of participation by the party against whom an administrative decision is made must also be shown to exist if procedural fairness requirements are to be satisfied.²⁵

Accordingly procedural fairness allows more participation and prevents elements of arbitrariness and uncertainty. Moreover, participation, per se, would give rise to social and individual improvement which is the cornerstone of all open government. From this, a sense of legitimacy is found which justifies administrators' decisions in terms of legally and morally acceptable principles which in turn ensures better decisions and outcomes.²⁶

Zarei further argues that procedural fairness is consistent with the underlying values of democratic process such as equal respect and concern for every citizen's rights. These values require public administrators not only to take into account effective use

²² Galligan D.J., *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996).

²³ Wade H.W. & C.F. Forsyth (1994) *Administrative Law: England*: Oxford University Press. 464

²⁴ Zarei Mohamed H. (1998) *The Applicability of the Principles of Judicial Review to the Delegated Powers of Ministers*. The University of Manchester, Faculty of Law. 134

²⁵ Dworkin, Ronald (1986), *A Matter of Principle*. Reprint. Harvard 72-104

²⁶ Galligan D.J. (1986), *Discretionary Powers: A Legal Study Of Official Discretion* : Oxford, Clarendon Press. 330-33

of resources in terms of a cost-benefit analysis but to ensure that principles of fairness are adhered to in decision-making processes.²⁷ However Zaeri's work while dealing with the significance of procedural fairness from a purely administrative law point of view fails to translate the same within the context of privatization which my paper will deal with.

Furthermore, in light of new paradigm shifts characterized by a democratic process in the whole area of administrative decision-making, Turpin argues that the whole machinery of government in all its levels and corners including civil servants, administrative agencies and non-departmental public bodies should be constitutionally accountable to parliament, parliamentary committees, electorate, the courts and citizens for administrative decisions.²⁸

Jody Freeman expresses the view that given the inevitability of public-private interdependence in the area of administrative and regulatory affairs, contracting out of public services could be a vehicle for legislative abdication of responsibility and fragmented accountability.²⁹ From an administrative law perspective, public-private contracts may subvert important public norms such as public participation in decision-making, rationality, fairness and accountability.³⁰

Nevertheless, the author argues that such a convergence could also present a potentially effective instrument of governance and a potentially powerful accountability mechanism in the event that courts create an appropriate jurisprudence by which private contractors will be bound by procedural fairness obligations and also provide conditions under which third party beneficiaries may have locus standi to hold such contractors accountable.

His work however mainly focuses on the issue of regulating the agencies or entities that have been awarded the provision of public services from a governance point of view and fails to address the vital element of procedural fairness in the awarding of such contracts which my paper endeavours to do.

³¹Paul Verkuil³² and A.S. Huque³³ both provide clear insights into the rational informing the privatization of public services and the accountability deficits that may be occasioned by the process.

²⁷ Zarei Mohamed, H. "Democratic Process and Accountability in Public Administration": Asian Review of Public Administration, Volume XII, No.2 (July-December 2000) 47.

²⁸ Turpin, Collin (1996), Ministerial Responsibility. In Oliver & Lester eds. Changing Constitution. England. New York. Oxford University Press.40

²⁹ Freeman Jody, "Contracting State," Florida State University Law Review (Vol.28:155) 61-63

³⁰ Ibid

³¹ Ibid

S.A. de Smith³⁴ and P.Cane³⁵ provide an excellent review in the whole area and practice of general administrative law, remedies thereto and legal redress available to individuals who are aggrieved by administrative decisions.

Peter Vincent Jones³⁶ expands the grounds of traditional administrative law into the privatization of public services in the process highlighting the accountability deficits likely to emerge as a result of the unique legal challenges posed by these novel developments and also proffering possible remedies to suit the evolved circumstances. His work however principally addresses the question of remedies that could possibly be developed in the future in order to ensure that individual citizens are adequately protected in the event of contractual breaches by parties who have been contracted out to provide public services. My work will improve on this by arguing that while the question of remedies is vital, situations of conflict between the service providers and individual public citizens can be greatly ameliorated by ensuring that proper fairness is exercised in the process of contracting out of provision of public services to private entities. In other words get the process right and the need for remedies will be minimized.

Within the Kenyan context the work of Dr. J.M. Migai Akech³⁷ clearly points out the necessity of procedural policing in the area of procurement of public goods and related services by private entities and in the process establishes the relevant essential conceptual and legal arguments in a local context. This work however deals mainly with the question of institutional oversight in the procurement of public goods and not necessarily in the context of provision of public services which my paper deals with.

My paper intends to build and improve on different aspects of these authors' contributions but will be fundamentally different in that its core argument is that it looks at the question of procedural fairness within the context of public service provision reforms within the context of a specific Kenyan case study. In the

³² Verkuil R.P., *Public Law Limitations on Privatization of Government Functions* (Daniel Austin Green Ed.) Cardozo Law School.

³³ Huque A.S., "*Competition, Contracts and Privatization: Global and Public Administration in Developing Countries*" (Institute For Globalization and The Human Condition, Mc Master University, Hamilton Ontario 2004.

³⁴ SA.de Smith, *Judicial Review of Administrative Action* (London: Sweet & Maxwell) 1995.

³⁵ P.Cane. *An Introduction to Administrative Law* (Oxford: Clarendon Press, 3rd Edition) 1996.

³⁶ Peter Vincent Jones (n.20) above.

³⁷ J.M. Migai Akech, *Development Partners and Governance in Kenya: Enhancing Democracy in the Administration of Aid*, 37 NYU JOURNAL OF INTERNATIONAL LAW 2005.

circumstances the main argument shall be that such reforms should bring values such as prudent utilization of resources, professional management of institutions and above all question of public participation in administrative decisions affecting provision of public services- which elements are inseparably intertwined with procedural fairness, openness and accountability.

In articulating the above argument my paper hopes to point out that addressing questions of procedural fairness in the privatization of public services provision is a fundamental element in the attainment of positive outcomes for such reforms and in so doing will hopefully provide some useful insights into the fledgling privatization jurisprudence in Kenya.

OBJECTIVES

The objectives of this project are: -

- To critically examine the contract between the Nairobi City Council and Adopt-a-Light Limited from the perspective of procedural fairness.
- To examine the rationale behind the privatization of public services generally and as in the case study in particular.
- To investigate the current legal regime in Kenya on the privatization of public services with a view to ascertaining its effectiveness.

HYPOTHESES

- The role of effective law is to foster qualities of good administration and respect for fundamental public interest values in any given legal process.
- Privatization of public services in the absence of legal regulatory frameworks that take into cognition the importance of due process and fairness can result into decisions that run against the grain of fundamental public interest values.

RESEARCH QUESTIONS

- Were principles of procedural fairness exercised in the award of the contract between Nairobi City Council and Adopt-a-Light Limited.
- Does Kenyan law generally take cognition of the fundamental principles of due process and fair procedure in the rendering of administrative law decisions law?
- To what extent is that recognition extended in the area of privatization of public services?
- What reforms can be made to the current legal and regulatory regime to cure its inadequacies?

METHODOLOGY

The material for this project will be sourced from

- Library research
- Internet research
- Interviews with experts in the area of privatization.

CHAPTER BREAKDOWN

Chapter One: The role of due process and procedural fairness in administrative decision-making.

Introduction

This chapter will discuss the jurisprudential concepts underpinning the notions of procedural fairness and due process insofar as the same relates to administrative actions. The fundamental principles therein will be examined and their application in the area of administrative decision law traced. Legal remedies that have traditionally been available to an individual aggrieved by an administrative decision will also be briefly outlined concluding our views on that discourse. The Chapter will conclude

with our evaluation on the position of procedural fairness and due process in the field of administrative law decisions as in the current case study.

Chapter Two: Procedural Fairness and Due Process in The Era of Privatization: the Kenyan position.

Chapter two will focus on the onset of the privatization concept in Kenya tracing the conceptual foundations informing its introduction and development into the arena of public services.

The accountability deficit challenges that may emerge in the era of privatization of public services from the perspective of the individual citizen will also be investigated at this point and juxtaposed with the views established in Chapter one.

A critical evaluation of the current legal and regulatory framework on law in Kenya in respect to privatization of public services will be within the remit of the Chapter pointing out any weaknesses and inadequacies therein insofar as accountability deficits are concerned. The findings therein will also, by way of brief comparative analysis be measured up with emerging trends in jurisdictions that have developed advanced levels of due process in the privatization of public services and the related issue of individual citizen's redress in the event of being aggrieved by an administrative decision.

Chapter Three: The Adopt-a-Light Case: An assessment from the perspective of procedural fairness and due process.

The case under study will be retraced in detail and critically analyzed in light of both our findings in Chapter one and those established from the critique of the Kenyan competition law regime in Chapter Two respectively. The chapter will also explore the possibilities of the evolution of jurisprudence that places a high premium on the fundamentals of due process and fair procedures by the courts and other tribunals involved in the privatization process.

A conclusion by way of an assessment of the case study's degree of compliance vis-à-vis emerging trends with respect to both the global and national levels respectively will also be tendered in this chapter.

Conclusion

Our recommendations aimed at ameliorating any accountability deficits that might have been established from our wider critique of the existing privatization regulatory framework in relation to the fundamental principles of procedural fairness and its implications on the case study will be offered in the conclusion.

CHAPTER ONE

The Role of Due Process and Procedural Fairness in Administrative Decision-Making

Introduction

Economic analysts and international agencies such as the International Monetary Fund and the World Bank have robustly advocated for privatization of public services. The privatization³⁸ of such services is largely based on the argument that the private sector is a more efficient service provider than the government.

Developing countries including Kenya have embraced, voluntarily or involuntarily, reform principles and strategies that exhort the privatization of public services through the contracting of such services.

The privatisation of public services can, and which fact is often overlooked, create substantial deficits in terms of legal accountability from the perspective of an individual citizen vis-a- vis the contracted service provider.

The present paper seeks to provide a framework for a detailed study on the legal accountability deficits that may accompany such privatisation. More often than not such deficits are often likely to occur from the fact that the individual citizen as a consumer of the privatized services is prevented from suing the service provider in contract due to lack of privity and or consideration. On the other hand the traditional redress available to the citizen by way of judicial review may also not be applicable on the basis that such legal redress relates to the actions of public bodies or their officers.³⁹ The genesis behind this anomaly lies in the distinction between public law and private law. This distinction is not only important insofar as legal remedies are concerned but is of fundamental importance in substantive law. Different principles govern both domains. In public law for instance, the central principle is that a public

³⁸ In various contexts the term privatization has assumed a generic meaning to describe a host of arrangements which may include among other things (1) the complete or partial sell-off (through asset or share sales) of major public enterprises;(2) the deregulation of a particular industry , (3) the commercialization of a government department;(4) the removal of subsidies to producers, and (5) the assumption of by private operators of what were formerly exclusively public services. through, for example, contracting out- See Freeman J, “ *Extending Public Law Norms Through Privatization,*” Volume 116 Harvard Law Review, Harvard, 2003,1287 and Bauman R.W., *Law & Contemporary Problems*, Autumn 2000, 1-2.

In the context of this work the term privatization is used within the meaning ascribed under the latter category i.e. the assumption by private operators of what were formerly exclusively public services, through contracting out.

³⁹ Vincent-Jones.P: “*Citizen Redress in Public Contracting for Human Services,*” *The Modern Law Review*, Volume 68 No. 6, Blackwell Publishing, Oxford 888.

authority must properly perform the public function legally assigned to it.⁴⁰ It must not exceed powers entrusted to it or encroach into jurisdiction not assigned to it. By so exceeding or encroaching, it will have acted *ultra vires*. A citizen affected by such excesses or encroachment has a right to move to court for judicial remedies to declare and enforce the law. If he succeeds, the court will quash the *ultra vires* act by such public authority.⁴¹

In private law on the other hand such as in the case of contractual situations, the cause of action will arise between the parties to the contract themselves. The cause of action revolves around the obligation of every individual and the corresponding remedies attached to those obligations.⁴² In other words public law remedies are ousted from the reach of the individual citizen by processes whose net effect is to consign what are essentially public functions to the realm of private law.

In the circumstances the effect of contracting out public services has arguably been to undermine, the legal protection of both the public interest in good administration, and the more particular interests of individual citizens directly affected by decisions or the quality of services.⁴³

Interwoven with the question of public law remedies, and perhaps more crucial is the engendering of situations which may result in circumvention of democratic procedures. In this context the democratic process is seen regarded as a method of social, administrative and political conflict resolution. Secondly, the participation of the public in the democratic process of government-including the running of public services- is an effective method of reducing the abuse of public powers.⁴⁴

The paper will in these circumstances set a foundation for the investigation of these legal accountability deficits in the Kenyan context on the basis of a specific case study.⁴⁵ Existing privatization legislation in Kenya will be juxtaposed with our findings from the case study with a view to point out any shortcomings and make recommendatory redress to ameliorate the same.

⁴⁰ Ibid

⁴¹ De Smith, Stanley and Rodney Brazier: Constitutional and Administrative Law, London, Penguin Books (1989) 567-69

⁴² Lord Denning, *The Discipline of Law*; London, Butterworths 1982, 133.

⁴³ Ibid.

⁴⁴ Gutmann, Amy: *Democracy*. In Robert E. Goodin and Philip Petit, eds., *A Companion to Contemporary Political Philosophy*. England: Basil Blackwell Ltd (1993), 411

⁴⁵ The "*Project Agreement*" dated 28th March 2002 to Contract out Street Lighting in the City of Nairobi between the Nairobi City Council and Adopt A Light Limited.

The Jurisprudential Basis of Procedural Fairness.

It has been authoritatively stated that it is now beyond argument that the principles of procedural fairness are an important consideration in penalty arrangements.⁴⁶

The importance of these notions as principles of public law is recognized world-wide through their embodiment, not only as a fundamental component of the common law, but also in international treaties, state constitutions, statutes and codes.⁴⁷

Additionally it has been argued that if justice is the first virtue of law and politics, then procedural justice is an essential element in its attainment. For no matter how good and just the laws and political principles supporting them may be, without suitable procedures they would fail in their purposes.⁴⁸

Indeed it has been stated that procedural fairness is not a matter of secondary importance but as the means by which drastic governmental powers can gain legitimacy.⁴⁹

What is Procedural Fairness?

What is procedural fairness and why does it constitute such an important element in the administration of public law?

Under common law procedural fairness refers to a legal doctrine in administrative law more commonly referred to as natural justice, with which public authorities must comply in making decisions. Natural justice is the name given to fundamental rules, which are necessary to the proper exercise of every kind of power.⁵⁰ In English law it covers two rules: first, that a man may not be judge in his own cause; and secondly,

⁴⁶ Australian National Audit Office. "*Administration of Tax Penalties*", Report 31 (2001). Australian Government Printing Service, Canberra para 14

⁴⁷ The Hon. Justice J. Von Doussa, "*Natural Justice in Federal Administrative Law*" (1998) 17 Australia Institute of Administrative Forum 1, 1

⁴⁸ Galligan D.J., *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford, Clarendon Press 1996 at the Introduction.

⁴⁹ Jackson J. in *Shaughnessy v. United States*, 345 U.S. 206 (1953).

⁵⁰ Wade H.W.R., *Administrative Law* (3rd Edition) Oxford University Press, Oxford (1971), 172

that a man may not be condemned unheard. These rules should apply to all administrative acts insofar as the nature of the case admits.⁵¹

However in the context of this paper the term procedural fairness extends beyond the common law position to encompass a broader ambit of principles which have general application to all areas of regulatory conduct where discretion is exercised in the running of public goods. This is what is sometimes referred to as the “non-instrumental” justification of procedural fairness.⁵² Under this head procedural fairness functions to protect both the human dignity and to enable citizens to participate in the decision-making process to which they are entitled to under a democratic society.⁵³

Thus in this context, the term “procedural fairness” refers to specific legal doctrines that express fundamental principles about the fair treatment of persons and the procedures needed to ensure fair treatment by public officials to such persons.⁵⁴

Does Kenyan law recognize principles of procedural fairness?

While the right to “due process” or procedural fairness may not be constitutionally guaranteed in Kenya the same is by implication recognized under statutory provisions that take cognizance of the availability of redress to a citizen aggrieved by the decisions of public officials or authorities.⁵⁵ It is argued in the circumstance that by providing the courts with the power and the procedure to supervise the activities of public governmental bodies on the basis of rules and principles of public law procedural fairness is a juridically recognized concept under Kenyan law.

The Kenyan position on procedural fairness borrows from the position at common law under which there is a duty to observe procedural fairness in the exercise of a power that is liable to directly and adversely affect a person’s rights, interests, status or legitimate expectations.⁵⁶ The common law position can in turn be traced back to medieval times and even to the ancient world where the question of procedural

⁵¹ Ibid

⁵² Galligan D., *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press, Oxford, 1996, 93

⁵³ See for example J Mashaw, *Administrative Due Process: “The Quest for a Dignitarian Theory”* (1981) 61 Boston Law Review 885

⁵⁴ Galligan (n.52) above.

⁵⁵ The Law Reform Act Chapter 26 of the laws of Kenya is the statutory basis for judicial review in Kenya while Order LIII of the Civil Procedure Act, Chapter 21 of the Laws of Kenya provides the procedural law.

⁵⁶ Minister for Information and Multicultural Affairs, Re: Ex-Parte Miah (2001) HCA 22 para 31

fairness was regarded as part of the immutable order of things so that under this original position, issues of procedural fairness could not be altered by legislation.⁵⁷

We saw earlier on that procedural fairness connotes the exercise of appropriate and fair procedures in the decision-making process by public officials.

To claim that a regulator's procedures are appropriate and fair is to claim a number of things. It could for example call into question whether the procedure followed by an administrative authority affects the legality of its actions. At another level it may infer the issue of whether the law should or should not impose a particular technique of administration on an administrative body. However, and within the remit of this paper, we are also referring to the quality of the processes used to make policies, rules or decisions. In evaluating these processes questions shall fall to be asked about their openness, transparency and accessibility to various groupings or individuals.⁵⁸

Procedures also refer to the steps taken, the means used in reaching a decision, carrying out a course of action, or settling a matter in some way within a legal or administrative context.⁵⁹

By process we are also referring to a distinct legal or administrative act, which usually involves a decision.⁶⁰

The expression "process" is thus a convenient generic term for referring to any such legal or administrative acts as well as decisions.

Process also includes the aggregate of procedures in relation to that decision or action.⁶¹

Legal and administrative processes are different from other social processes in that they are made under the authority of legal standards, which define and set limits to the scope of authority. It is also characteristic of such processes that other legal standards normally stipulate the criteria for exercising that authority.⁶²

⁵⁷ Wade(n.8above) 173

⁵⁸ Baldwin R and Cave M , *Understanding Regulation: Theory Strategy and Practice*, Oxford University Press, Oxford (1999),314

⁵⁹ Galligan D.J., *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press, Oxford,(1996),8

⁶⁰ Ibid

⁶¹ Ibid

⁶² Galligan (n.10)above 8

While the importance of procedural fairness may now be established and recognized as part and parcel of modern legal thought, perhaps it may be useful at this point to lay out a jurisprudential basis informing the same.

Theoretical Frameworks of Procedural Fairness:

Several schools of thought have been advanced by different jurists with regard to theoretical foundations on procedural fairness.

For instance, according to Jeremy Bentham the objective of procedures is to produce an accurate outcome, and that the reason for seeking such accuracy is utility- not the direct utility in upholding laws which themselves maximize utility but the utility in the social stability which follows from the accurate and regular application of laws.⁶³

Accurate outcomes in Bentham's view are important because they translate into the upholding of social values, the values inherent in the substantive law and the value in stability through regular and consistent application of the law.⁶⁴ In other words accurate outcomes, which are engendered by observance of procedures, ensure positive social outcomes.

Bentham's insistence on accurate outcome of facts on the correct application of the law to an accurate finding of facts remains a simple but fundamental feature of legal processes.⁶⁵

What is at stake is the simple idea that in any legal process, especially that involving action against an individual person or group of persons authoritative legal standards are stipulated as to how the matter should be dealt with; the application of standards in turn depends on accurate findings of fact.⁶⁶

In each case, there are standards to be applied, not necessarily standards dictating a specific outcome but at least standards guiding and constraining the reasoning towards an outcome.

⁶³ Twining W, *Theories of Evidence: Bentham and Wigmore*, Weidenfeld London (1986) and Postema G, *Bentham and the Common Law Tradition* Clarendon Press, Oxford (1988) 83

⁶⁴ Galligan D.J., *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press, Oxford(1996) 10

⁶⁵ Ibid

⁶⁶ Galligan(n.13) above11

If accurate outcomes are understood as the proper application of authoritative legal standards, then it not only applies across the board of legal processes, but also remains a fundamental part of the process.⁶⁷ Although that does not imply that the question of accurate outcomes is all that matters in legal processes, it is arguable however to say that whatever other factors we may need to add, it does remain a crucial element in the decision-making equation.

According to Dworkin, the need for procedural fairness is based on the need for clarity of what follows upon the ascertainment of an individual's rights in society.⁶⁸ In his view, once the content of an individual's right is determined, the community must furnish the minimum level of protection against the risk of injustice required by that content.⁶⁹ In the circumstances the duty to follow procedure takes the form of a moral undertaking by society collectively to each of its members individually that rights will be upheld via the observance of procedural fairness in the adjudication of individual rights and benefits-which process includes the participation of the public in such decision-making.⁷⁰

Therefore, and in line with Dworkin's theory, it will be argued in this paper that to satisfy procedural fairness in the dealing of public goods, a certain mode of participation by the public is required as a significant aspect of instrumental rationality.

Pursuant to the above it has been argued that one of the crucial factors in distinguishing public administration from privately managed set-ups is the existence of control and responsibility of public officials through the legal, political, public and administrative procedures as instruments of democratic process.⁷¹

These concepts of control and accountability are rooted in the fundamental values of a democratic society. The underlying purpose of accountability should in turn be girded in the principles of democracy, the rule of law and effective and good governance.⁷² In other words, accountability has a procedural character which is inspired by the methodic concept of democracy. Public administration decisions should thus reflect

⁶⁷ Ibid

⁶⁸ Dworkin R.M., *A Matter of Principle*, Clarendon Press, Oxford, 1985, 89

⁶⁹ Ibid

⁷⁰ Ibid.

⁷¹ Zarei M., "*Democratic Process and Accountability in Public Administration:*" *Asian Review of Public Administration*, Volume XII, No.2 (July- December 2000) 40.

⁷² Ibid

such a procedural value to produce effective outcomes and secure legal, moral and rational justification for the decisions made by public authorities.⁷³

Conceptions of Democracy:

Joseph Schumpeter defines democracy as an institution which enables individuals and groups to race for the people's vote to acquire political decision-making power through the means of competitive struggle.⁷⁴ This theory hence emphasizes the value of the process of democracy which is competition and participation.

In contrast to classical direct democracy, unfortunately, modern representative democracies create very limited space and opportunity for meaningful participation.⁷⁵ This has led to the development of the notion of participatory democracy which holds that people should be more involved in making public decisions. This idea is able to provide a range of options to be considered, and preserves a minimum level of effectiveness of public use of resources and opportunities.⁷⁶ In recent representative democracies, due to lack of effective people's participation, it will be argued, serious problems such as misuse of public powers, corruption and extensive violations of individual's rights and liberties have been perpetrated by public officials. Participation is based on the principle of equal rights of every citizen in taking part not only in the process of implementation but also in all the stages of setting objectives, policies and programmes.

In addition, participation reduces the opportunities for the arbitrary use of power and public funds by public authorities. Therefore, this theory offers a system of procedural guarantee and accountability to ensure more informed, effective and rightful decisions. Hence public officials are not only accountable to administrative, political and legal institutions, but also to the public in various ways and forms such as consultation, public hearings and inquiries, consumers' organizations, compensation, press, social and interest groups and all other stakeholders in a given process.⁷⁷ In sum therefore democratic procedure in the context of this paper will be concerned not merely with the common law notion of procedural fairness but also more importantly with what can be defined as "institutionally guaranteed equality in the procedures of

⁷³ Ibid.

⁷⁴ Lyland, J.L., *Democratic Theory: The Philosophical Foundations*. England: Manchester University Press, 1995, 163

⁷⁵ Zarei(n.71)above,42

⁷⁶ Ibid

⁷⁷ Ibid.

decision-making”⁷⁸ so that every citizen has an equal right to take part in decision-making process to influence or shape the final decisions made by public authorities over the distribution or access of wealth, resources, opportunities, jobs and other public goods.

The Purposes of Legal Processes:

We have seen earlier⁷⁹ on the idea that for each legal process there are standards to be applied and that the object of procedures is to do just that.

Therefore in that sense where a particular legal process is involved whether it is a civil trial or decision-making process by a public administration body, the task is to identify the legal standards and then to direct procedures to their application.

This argument might seem to be inconsistent where the exercise of discretion is involved since discretion in the strict sense implies an absence of binding legal standards.⁸⁰

The situation may be even more complicated where the statute under which discretion is exercised might give little guidance⁸¹. On the other hand the law developed in judicial review does little more than require that discretion be used reasonably and in good faith and according to whatever objects can be ascertained. In such cases however, it is still arguable that those very matters constitute defined standards in which event the object of procedures is to ensure that discretion is exercised in compliance with them.⁸²

Apart from ensuring the application of pre-determined standards in a given legal process, procedural fairness also concerns itself with the way persons are treated in legal processes. Whenever a question arises about how a person should be treated, about allocation of burdens and benefits, where rights or interests are affected, fairness is invariably an issue.⁸³

⁷⁸ Lyland(n.74)above 51-75

⁷⁹ See Note 23 above.

⁸⁰ Galligan D.J.(n.64) above 13

⁸¹ For example a study of regulatory bodies found little guidance in governing statutes as to purposes and standards- Baldwin R and McCrudden C(eds), Regulation and Public Law Weidenfeld and Nicholas, London

⁸² Galligan(n.17)above 13

⁸³ Ibid 53

Fairness is often linked to ideas about giving a person what is due, but it goes further and rests on the general principle that a person is treated in a way to which he has a justifiable claim. There is also inherent within the concept of procedural fairness that fair treatment is the promise of society as a whole to each of its members that they will be treated in that way.⁸⁴

Societies will however differ in their conceptions of procedural fairness, which is to say that both the standards of fair treatment and the procedures considered most suitable for applying them will differ for each given society.⁸⁵

Therefore it is arguable that while the general concept of procedural fairness may have acquired a universal outlook the interpretation and application of the same is not uniform. In the circumstances it becomes necessary for a given society to establish and promulgate appropriate standards of procedural fairness to govern various facets of society.

Having established a jurisprudential basis for procedural fairness, we shall now proceed to examine the fundamental elements that are essential in the exercise of procedural fairness. In other words what factors constitute the basic minimum content of procedural fairness?

Principles of Procedural Fairness:

From the perspective of common law, principles of procedural fairness are primarily concerned with rules of natural justice. The principles were developed by the courts and were applied to public authorities engaged in administrative decision –making functions.

In broad terms, the principles of procedural justice in this sense espouse the rule against bias and the duty to hear the other side.⁸⁶

These principles form the hallmark benchmarks in the exercise of discretionary administrative powers by public officials and are grounded on the idea that however wide the powers of the state and however extensive the discretion they confer, such

⁸⁴ Ibid

⁸⁵ Rawls J, A Theory of Justice, Clarendon Press, Oxford, 1972.section 2

⁸⁶ Wade H.W.R, Administrative Law(3rdEdition), Clarendon Press,Oxford (1971)172

decisions should be subject to the overall supervision of the courts to ensure that they are exercised in a procedural and fair manner.⁸⁷

Thus whilst demands for procedural fairness can, and often will restrict the exercise of administrative action, and that the observance of the same costs time and money the fact that they are essentially rules for upholding fairness hence reducing citizens' grievances means that they are a fundamental pillar in the administration of justice.⁸⁸ In the circumstances it is argued in this paper that such rules promote efficiency rather than impede it.

What are the salient principles of procedural fairness?

Professor Margaret Allars has stated that the content of procedural fairness ranges across a spectrum.⁸⁹

At one end of the spectrum procedural fairness emulates the procedures of adversarial litigation whereby affected persons are bound to be given notice. Allars argues that the minimum content of procedural fairness is that notice be given to the affected person.⁹⁰ The question whether rights, interests, status or legitimate expectations are affected is also relevant to the practical content of the duty in any particular case.⁹¹

A range of factors will be relevant; such as the nature of the decision to be made, the range of affected interests, the extent of the interest of the person or persons affected, and the seriousness of the implication of the decision.⁹²

Flexibility is, in effect, the fundamental principle which guides the approach of the courts in determining the content of procedural fairness in addition to the basic elements of natural justice as established under common law.⁹³ The salient elements

⁸⁷ Ibid

⁸⁸ Craig P, *Administrative Law*, Sweet & Maxwell, London 5th Edition.

⁸⁹ Allars M, *Introduction to Australian Administrative Law*, Butterworths, Sydney 1990, 261

⁹⁰ Ibid

⁹¹ *Haoucher .vs. Minister for Immigration and Ethnic Affairs*, (1990) 169. CLR 648,653.

⁹² Yeung K., "*Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles*" (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney 8th June 2001.

⁹³ Dyer B., "*Determining the Content of Procedural Fairness*" 19 *Monash University Law Review* (1993) 165-166.

on procedural fairness as established by the courts over time are briefly spelt out as hereunder:

(a) Nemo debet esse iudex in propria causa:

The first principle of procedural fairness *nemo debet esse iudex in propria causa*, stipulates that no man can be a judge in his own cause where there is some direct interest in the matter to be adjudicated or where there may be some reasonable suspicion, appearance or likelihood of bias.⁹⁴

Thus for instance in **Metropolitan Properties Co. (FGC) Ltd –vs- Lannon**⁹⁵, the court quashed the decision of a Rent Assessment Tribunal reducing the amount payable in a certain housing estate on the basis that the chairman of that tribunal who lived with his father had dealt with previous disputes involving his father and the applicant housing company.

The High Court in Kenya has also recently upheld this position in the landmark case of **Republic vs. Judicial Commission Investigating the Goldenberg Affair ex parte Saitoti**⁹⁶. In this case the court held that there was a clear case of bias on the part of the Commission of Inquiry investigating the Applicant's role in the Goldenberg scandal on the basis that it had failed to take into account matters it ought to have taken into account and acted unreasonably or irrationally in arriving at its findings. The Court in finding for the applicant proceeded to quash parts of the Commission's report relating to accusations against the Applicant.

(b) The duty to act fairly:

This constitutes the second major principle in procedural fairness. It implies an obligation to observe some aspect of the rules of procedural fairness in the context of the circumstances and background of a given situation. For instance in disciplinary proceedings, the rules would demand that a person be afforded the right to be heard and not be subjected to a biased hearing.⁹⁷ **In R-vs- Liverpool Corporation ex-parte Liverpool Taxi Fleet Operators Association.**⁹⁸ the respondent was vested with the statutory power to license taxis. Following discussions between the respondent and

⁹⁴ As per Lord Denning in Metropolitan Properties Co. (FGC) Ltd- vs- Lannon (1968) 3 ALL ER. 304

⁹⁵ Ibid

⁹⁶ High Court Miscellaneous Civil Application No.102 of 2006.

⁹⁷ R-vs- Liverpool Corporation ex-parte Liverpool Taxi Fleet Operators Association(1972) 2 ALL ER 589

⁹⁸ Ibid

the applicant the former gave an undertaking not to grant any further taxi licences pending legislation to regulate mini cabs in the City of Liverpool. Subsequently and without consulting the Association, the respondent proposed to increase the number of licences in breach of the undertaking given to the Association. The court in this case held that as part of its duty to act fairly, the respondent was under an obligation to consult the Association prior to such a decision.

(c) The right to be heard:

Under the principles of procedural fairness there is an established presumption that parties who are likely to be affected by the administrative decisions of public authorities have a right to be heard. Indeed Kenyan courts have held that there is an inherent presumption of the right of an affected party to be heard in the interpretation of statutes.⁹⁹ In the Kenyan case of **David Onyango Oloo-vs- Attorney General**¹⁰⁰, the Commissioner of Prisons purported to deprive the applicant remission to which he was statutorily entitled to under the Prisons Act, Chapter 90 of the Laws of Kenya. Prior to the exercise of the said decision, the Commissioner of Prisons did not afford the applicant an opportunity to be heard. The Court of Appeal held that the Commissioner's act to deprive the appellant of his remission was null and void and proceeded to quash it.

(d) Prior notice:

Under this principle a public authority is expected to inform the affected person or persons of what it proposes to do. Notice in the circumstances serves to put the affected persons in a state of awareness thus affording such persons the opportunity to counter such proposed action.¹⁰¹ This position was upheld by Nyarangi J.A. in the **Onyango case**.¹⁰² In **Glynn-vs- Keele University**¹⁰³ it was also held that the expulsion of the applicant student from the University's hostels without notifying him of any charges was a breach of the rules of natural justice. Notice must be given any time proceedings against a person are to take place.

⁹⁹ Nyarangi JA in David Onyango Oloo-vs- Attorney General, Civil Appeal No. 152 of 1986.

¹⁰⁰ Civil Appeal No.152 of 1986

¹⁰¹ Glynn vs Keele University (1971) 1 W.L.R. 487

¹⁰² Civil Appeal 152 of 1986

¹⁰³ See (n.55) above.

(e) The opportunity to be heard:

In the exercise of their decisions, statutory or otherwise, public administrative bodies are under an obligation to provide the affected parties with a fair opportunity to put their case and to correct or contradict any relevant issues that may be prejudicial to their position.¹⁰⁴ This requirement also facilitates an avenue by which the affected citizen can canvass his rights to adequate consultation on the matter.¹⁰⁵

Kenyan courts have upheld this position. In the case of **Rita Biwott-vs- The Council of Legal Education**¹⁰⁶ where the Applicant's application to be admitted to the Kenya School of Law was rejected on the ground that the Council did not approve her two year degree at the University of Edinburgh under Section 13(1) of the Advocates Act.¹⁰⁷ In finding for the applicant, the High Court ruled that she had not been given a hearing before her application was rejected and thus there was a breach of the rules of natural justice. The decision of the Council was quashed and the principal of the Kenya School of Law ordered to admit her at the school.

(f) Disclosure of information:

The information upon which a public administrative body relies in arriving at its decision is open to disclosure to the person or persons affected by the decision. Courts have held that failure to do so may nullify such decisions.¹⁰⁸ The Privy Council in **Kanda-vs- The Government of Malaya**¹⁰⁹ quashed the conviction of the Applicant, who was an Inspector of Police on the ground that he had not been given the opportunity to see the report of the inquiry of his conduct.

¹⁰⁴ Board of Education-vs- Rice (1911) A.C. 179

¹⁰⁵ Lumumba P.L.O., An Outline of Judicial Review in Kenya, University of Nairobi, 1999, 54

¹⁰⁶ In the matter of Rita Biwott-vs- The Council of Legal Education, HCCC Misc. Civil. Case No.122 of 1994

¹⁰⁷ Chapter 16 Laws of Kenya.

¹⁰⁸ Kanda vs The Governor of Malaysia (1962) A.C. 322

¹⁰⁹ Ibid

(g) Giving Reasons:

Traditionally courts of law and administrative tribunals are under no duty to give reasons for their decisions.¹¹⁰

However courts have now progressively insisted that giving of reasons constitute a component of procedural fairness. This is usually reflected as an aspect of the fair hearing rule which was discussed herein earlier.¹¹¹

Indeed some courts have made it a mandatory requirement that public administrative agencies provide reasons for their decisions. To that effect Lord Reid has for instance stated:

“I cannot agree that a decision cannot be questioned if no reasons are given”.¹¹²

From the foregoing Kenyan cases it is clear that Kenyan courts are willing to extend judicial review remedies to applicants who are aggrieved by the decisions of public bodies in the performance of their duties. It also emerges that the English or common law position heritage has had and continues to have a major impact, which must always be taken into cognisance.¹¹³

Effect of Breaches of Procedural Fairness Principles:

The effects of a failure to comply with the rules of procedural fairness by a public administrative body in the exercise of its authority is that any decision or other administrative action made or taken will be null and void.¹¹⁴

Breach of procedural fairness has in the circumstances remained a pivotal ground for a party dissatisfied with a public administrative body's decision in the pursuit of judicial remedies. Some statutory administrative agencies may also provide for an appeal process within the statute or agency's rules.

However until the decision is nullified by the court the administrative decision does have force of law.¹¹⁵

¹¹⁰ Lumumba(n.59) above 56

¹¹¹ Civil Appeal No.152 of 1986(n.91) above.

¹¹² Padfield vs The Minister for Agriculture, Fisheries & Food (1968) A.C. 997.

¹¹³ Lumumba P.L.O., An Outline of Judicial Review in Kenya, Faculty of Law University of Nairobi, 1999,12

¹¹⁴ Lumumba Supra 56

¹¹⁵ Per Lord Wilberforce in Calvin vs Carr (1979) 2ALL ER 440

It is against this background that we shall seek to establish the judicial remedies available to citizen aggrieved by a public authority's decision.

Remedies for breach of procedural fairness:

We saw earlier in the discussion that decisions of public administrative bodies are open to the scrutiny and review of the courts for purposes of ensuring that principles of procedural fairness have been observed in the decision making process.¹¹⁶

Through the process available under the inherent power of the courts to supervise the decisions of public bodies by way of Judicial Review¹¹⁷ then lies an important avenue via which the aggrieved citizen can enlist the help of the courts to review the decisions of such public officials.

Perhaps it is also important at this juncture to clarify on the distinction between “application for judicial review” and “judicial review” as the two terms often times pose some confusion to readers. The former basically refers to the procedure through which one can seek judicial review of a public bodies' decision.

Judicial review on the other hand, which is the subject matter of this discussion, refers to the power to supervise the activities of public governmental bodies on the basis of rules and principles of public law.¹¹⁸

In the earlier part of this discussion¹¹⁹ we established that there is a dichotomy of legal regimes to govern the affairs of public bodies and non-public bodies and that under that distinction public law might be defined as law that concerns the activities of public governmental bodies, their creation and organization.¹²⁰ In other words there is recognition in law on the need to subject activities of governmental agencies to a different legal regime from that, which regulates the activities of private individuals.

¹¹⁶ Per Lord Reid in *Padfield vs The Minister for Agriculture, Fisheries & Food* (n.103) above at 997.

¹¹⁷ Under The Law Reform Act, Chapter 26 of the Laws of Kenya, the remedies of certiorari, prohibition and mandamus are the ones available to aggrieved citizens against public bodies in an application for Judicial Review.

¹¹⁸ Cane P., *An Introduction to Administrative Law* (3rd Edition) Oxford University Press Oxford 1996

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¹¹⁹ See notes 2 and 4 respectively.

¹²⁰ *Ibid.* 12

A number of other arguments have been proffered for this distinction. Firstly, it is argued that since government has the job of running the country, it must have some functions, powers and duties, which private individuals do not have.¹²¹

Secondly, because of the very great power which the government can wield over its citizens, it may be prudent to impose on public bodies special rules or duties of procedural fairness which do not normally apply to dealings between private citizens and special rules about the substance of what the former may do and decide.¹²²

Thirdly, due to the fact that public bodies often have a monopoly over certain activities in respect of which the citizen has no choice but to deal with such bodies, it is argued that such activities ought to be subject to forms of public accountability.¹²³

Finally, because the courts are themselves organs of government, the view they take of their proper role when dealing with the exercise of governmental power is different from the way they view their role in relation to purely private matters. In the case of the latter, they view their role as primarily to interpret, apply and enforce the law.

With regard to the former, courts take a more restrained view of their role largely in consideration of the doctrine of separation of powers.¹²⁴

In considering the remedies available to a citizen under judicial review,¹²⁵ which we saw earlier, include prohibition, certiorari and mandamus, it is noteworthy that the law of judicial review is available not only to individual citizens but also to public bodies with a grievance against another public body.¹²⁶

Notwithstanding the foregoing, to be entitled to a remedy by way of judicial review an individual citizen must have sufficient standing (*locus standii*).¹²⁷ In other words courts will only grant the remedies of mandamus, certiorari and prohibition where the individual applicant has the requisite standing, status or interest in the issue before the court. Where such an individual is directly affected by the decision or other action of a public body he will have the standing and should be able to seek his remedy to what he alleges to be a decision contrary to the principles of procedural fairness. Courts

¹²¹ Cane (n. above) 13

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ See Footnote 69 above

¹²⁶ Cane Supra 42

¹²⁷ Sir Konrad Scheimann(1990) PL 342

have traditionally been reluctant to be liberal on the requirement for locus standii on the basis that the law is premised on the condition that remedies must correspond with rights and that only those whose rights are infringed are eligible to seek remedies.¹²⁸ Courts are also afraid of the possibility that a relaxation on the requirement for standing on the part of an applicant may open the floodgates to busy bodies. They also fear that cases will not be best argued by parties whose personal rights are not in issue.¹²⁹

In the English case of **R –vs- Inland Revenue Commissioners ex-parte National Federation of Self-Employed and Small Business Limited**¹³⁰, the Inland Revenue Authority in the U.K. reached an arrangement with Fleet Street casual workers requiring them to register for future tax on the condition that they would not be investigated for past taxes. The federation representing self-employed and small business taxpayers applied by way of judicial review for a declaration and an order for mandamus on the grounds that the “tax amnesty” was unlawful. The House of Lords held that whilst the Revenue Authority was amenable to judicial review, the Federation lacked standing and had no prospect of showing illegality. This traditional requirement for standing has however undergone substantial transformation departing from the strict requirement on standing to the more liberal requirement for the applicant to show a “sufficient interest” in the matter.¹³¹ Kenyan Courts have adopted a more or less similar position as in the case of **R-vs- Minister for Information & Broadcasting and Ahmed Jibril, ex-parte East African Television Network Limited (EATN)**.¹³² In that case the applicant prayed to court by way of judicial review for orders directed to the Minister for Information and Broadcasting by way of certiorari to quash his decision to cancel the radio and television licences issued to it. It also sought an order of mandamus to compel the Minister to restore the cancelled licences. In dismissing a preliminary objection by the respondents regarding the applicant’s lack of locus standii, the court held that the applicant had a sufficient interest in the matter as to warrant his action against the Minister. In so doing the court had departed from the rigid traditional requirement for locus as had been exhibited in earlier pronouncements such as in the **Wangari Maathai v The Kenya**

¹²⁸ Wade H. W.R. & Forsyth C, Administrative Law, 3rd Edition, Clarendon Press, Oxford.1971.696

¹²⁹ Lumumba Supra.Chapter 1, note66 at 85.

¹³⁰ [1982]A.C.617.

¹³¹ R-vs- Secretary of State for Foreign Affairs ex-parte World Development Movement Limited [1995] 1All ER 611

¹³² High Court Misc. Civil Application No. 403 of 1998.

Times Media Trust.¹³³ It is our submission that such jurisprudential developments by the courts are most beneficial to the whole question of procedural fairness given that the *raison detre* for procedural fairness is to submit, for scrutiny, the decisions of public bodies which may directly affect the individual citizen's rights. To extinguish or attenuate the possibility of such inquiry on the basis of technicalities such as the requirement for locus is patently absurd and must, rightly so, be discouraged if procedural fairness is to be realized. The court in analysing the issue before it reasoned that procedural fairness is so fundamental in the exercise of administrative action that any attempt to curtail it would not be tolerated.

In a nutshell, Kenyan courts have moved in tandem with the English courts and appear to be applying sufficient interest as the test for locus standii.¹³⁴ These developments in the requirement for standing indicate that the law's primary concern is not to control the activities of public bodies but rather to control the exercise of such activities insofar as the same affects the individual citizen. The substantive legal position discussed earlier on restricting the availability of public law remedies only against public bodies however subsists notwithstanding the liberal interpretation of courts on the question of locus standii.

This position will prove to be crucial particularly in the context where an individual citizen may seek to challenge, on public law grounds, decisions or activities of a non-public body; such as a private company, the jurisdiction of which depends solely on contract.

In such circumstances the only remedies that would be available are private law remedies.¹³⁵

This as we shall argue in this paper can and does translate into democracy deficit situations for the individual citizen in that public law remedies may have been ousted from the citizen's reach through the process of contractualisation of public services. This anomaly becomes particularly acute where the citizen's input in the decision to privatize the public service is stifled or denied through breach of procedural fairness.

¹³³ High Court Civil Case No. 5403 of 1989.

¹³⁴ Lumumba supra (n.81) at 93.

¹³⁵ Cane Supra 42

It is under these circumstances that a citizen who feels aggrieved by a decision resulting from a breach of procedural fairness has the right to enlist judicial review remedies, which are public law remedies.

Public and Private Law Remedies:

The distinction between public and private law is not only important when it comes to remedies for breach of procedural fairness but is also of fundamental importance in substantive law.

In public law, for instance, the central principle is that a public authority must properly perform the public function legally assigned to it. By exceeding that authority, it will have acted *ultra vires* hence the right of a citizen affected by such excesses to move to the court to declare and enforce the law.¹³⁶ In other words the individual who wishes to defend, assert or establish his legal rights in the face of an act of procedural fairness occasioned by a public body has the right to challenge such acts in a court of law- these include the acts of public service providers.

In private law on the other hand, causes of action can only arise between parties who have hitherto prescribed obligations such as contractual obligations that accrue in the case of contracts. In such circumstances it revolves around the obligation of every man attached to those obligations.¹³⁷

As indicted earlier¹³⁸ the remedies available under Kenyan law to an individual citizen seeking the orders of such judicial review of a public authority's acts are certiorari, mandamus and prohibition.¹³⁹

We shall now proceed to establish the remedies that have traditionally been at the disposal of an aggrieved citizen bearing in mind however the caveats regarding their availability as noted hereinbefore.

¹³⁶ Lumumba P.L.O. , An Outline of Judicial Review in Kenya. Faculty of Law, University of Nairobi, Nairobi 1999, 104

¹³⁷ Lord Denning; The Discipline of Law: Butterworths, London 1982 133

¹³⁸ See Note 69 above

¹³⁹ Sections 8 and 9 of The Law Reform Act Chapter 26 laws of Kenya as read together with Order 53 of the Civil Procedure Rules. Under common law on the other hand the contractual remedies include inter alia damages for breach of contract, specific performance and rescission of the contract.

(a) **Mandamus:**

This remedy issues in cases where there is a duty imposed by statute. It compels the fulfilment of a duty where there is lethargy on the part of a public authority or officer.¹⁴⁰ Mandamus can only be used in relation to a duty which, as a public duty is also specifically enforceable. It therefore means that mandamus cannot be enlisted to enforce a general duty arising from contractual obligations under private law arrangements.

(b) **Certiorari:**

In the context of remedies available against public administrative action, certiorari removes proceedings from a public administrative agency or inferior tribunal to a higher court for purposes of quashing such proceedings on grounds of:

- (i) Ultra Vires,
- (ii) Breach of procedural fairness and,
- (iii) An error of law on the face of the record.

In effect decisions of public bodies are brought to the High Court for scrutiny to ensure that procedural fairness has been observed in the decision making process.

Bodies whose decisions are amenable to certiorari include:¹⁴¹

- (a) Administrative tribunals.
- (b) Inferior courts.
- (c) Local Authorities.
- (d) Ministers of Government.
- (e) Statutory bodies exercising public functions.

As a general rule therefore it can be said that certiorari applies to statutory bodies performing public duties with an obligation to act judicially. The remedy does not apply to purely private entities for example where the relationship is based on a privately concluded contract.¹⁴²

¹⁴⁰ Lumumba(n.54) above 108

¹⁴¹ Lumumba Supra 112

¹⁴² Ibid

(c) Prohibition:

As the name suggests, this remedy seeks to prevent *ultra vires* actions offending principles of procedural fairness from taking effect pending a final decision by a statutory public agency exercising public functions with an obligation to act judicially.¹⁴³

In the words of Lord Denning M.R.

“It [prohibition] is available to prohibit administrative authorities from exceeding their powers or misusing them”.¹⁴⁴

It follows therefore that principles of procedural fairness as well as of fair play must be exercised by the public authority. Indeed Kenyan courts have held that prohibition lies not only for excess jurisdiction or the absence of it by a public body but also for a departure from the principles of procedural fairness as held in **R-vs- Kenya Posts & Telecommunications Corporation**¹⁴⁵. In that case the officials of the Karen and Langata District Association (KARENGATA) applied for judicial review of the respondent's decision requiring all telephone subscribers in Kenya to pay their bills either in cash or bankers' cheques. The applicants alleged that the respondent's decision was *ultra vires* the statutory provisions¹⁴⁶ governing the respondent and sought an order of prohibition against the corporation's decision.

In finding for the applicants the court held that the respondent's decision was *ultra vires* and would be tantamount to unfair treatment of many subscribers because of the few bad acts of a few without any good reason. In reaching the said decision the court was of the view that the decision by the Corporation was made and implemented irrationally and in excess of its statutory jurisdiction. In other words the Corporation had failed, in the exercise of that decision; to observe the principles of procedural fairness which, as a public body it was legally bound to adhere to.

¹⁴³ Lumumba P.L.O., An Outline of Judicial Review in Kenya, Faculty of Law, University of Nairobi, Nairobi 1999 112.

¹⁴⁴ R-vs-Electricity Commissioners ex-parte London Electricity Joint Committee Co. Ltd (1924) 1 KB 559.

¹⁴⁵ High Court Misc. Application No. 869 of 1995.

¹⁴⁶ Section 63 of The Kenya Posts and Telecommunications Act Chapter 411 of the Laws of Kenya (now repealed).

Conclusion:

From the foregoing it is clear that procedural fairness is central in facilitating and ensuring the correct application of the law to a given situation. Procedural fairness is also grounded on the basic function of the law to treat all members of society equally both in terms of application and protection to its subjects.

By ingraining procedural fairness in decision-making, public authorities are therefore held accountable in their actions towards the citizen. Furthermore by lending the decisions of such bodies open to the scrutiny of the courts, which are ready to nullify decisions that are not compliant with principles of procedural fairness, citizens are shielded from injustices that may be occasioned by public officials in the exercise of administrative power.

We have also established that the doctrine of procedural fairness avails public law remedies to individual private citizens who are aggrieved by the decisions of public authorities including those tasked with the provision of public services. Those remedies, we noted, are not available to the citizen in the realm of private law. The recognition in law that public remedies are only available against public bodies as opposed to private bodies further emphasises the importance of these remedies in the sphere of public law governance.

In the process social values such as good governance, accountability and individual citizen rights are protected – which are some of the basic functions of any legal system.

Secondly, and more importantly we have established that the question of procedural fairness is also consistent with the underlying values of democratic process such as equal respect and concern for every citizen's rights and autonomy embedded in the participatory and liberal theory of democracy. All in all, these values require public authorities, in deciding matters of public concern, not only to follow the appropriate legal procedures but also to take into account effective use of resources in terms of a cost-benefit method of analysis together with the legal and moral implications of their

decisions and policies.¹⁴⁷ In other words procedural fairness demands not only an adherence to laid down procedure but also to a deliberate consideration of the net effect of a decision by public officials on the affected citizens.

In conclusion therefore we see the fundamental position of procedural fairness in the provision of public services in that the same operates as an important accountability mechanism by which decision makers-in this context public service providers- are answerable to the individual citizen in respect of decisions and actions undertaken in the course of the provision of those services.

¹⁴⁷ Zarei(n.74)above48

CHAPTER TWO

Background to the privatization of public services:

INTRODUCTION

This section will look at the historical background to public enterprise privatization in Kenya and how the same has developed in time to extend to the areas of contracting out of the provision of public services. It will be argued in this section that the privatization process in Kenya has given little consideration for public interest issues more so in the context of procedural fairness to the individual citizen whose rights may be curtailed by such developments. The overriding reasons behind privatization have largely been externally driven and coupled with the narrow economic interests of the political elite to profit from the process. In the circumstances, it will be argued that procedural fairness issues have not been adequately addressed in the evolution of this process.

It is in the light of the foregoing, that the case study under discussion will be discussed in detail in this chapter.

HISTORICAL BACKGROUND

The genesis of the privatization of public services can be traced back to developments in the industrialised countries of Western Europe after World War Two.¹⁴⁸

Public administration actors, institutions and processes came under severe criticism in most of these states, as they seemed increasingly inappropriate for performing the tasks expected of them.¹⁴⁹ The governments in these countries moved to alleviate the problems by introducing reforms in the public sector. The reforms shifted the focus from public bureaucracy and public sector values from rule-based to role-based. Under the latter there was now an emphasis on organizational techniques such as competition, cost- efficiency, and orientation towards performance and results.¹⁵⁰

¹⁴⁸ Krause H and Bisley S, *Discursive Globalization :Transnational Discourse Communities &New Public Management* ,” in Morten Ougaard & Richard Higgott, eds. *Towards A Global Polity*, Routledge, London 2002 107-08

¹⁴⁹ Huque A.S., *Competition, Contracts and Privatization: Global and Public Administration in Developing Countries*, Mc Master University, Hamilton,Ontario, 2004, 1.

¹⁵⁰Krause, Salskov- Inversen and Bisley(n.1) above.107-08

Initially, these reforms aimed at cutting costs in the provision of public services and reducing the size of bureaucracy.¹⁵¹ Subsequently, the reforms also attempted to usher in changes in the approach and attitude, and more radical solutions were considered including the overhaul of public sector organizations and the introduction of market principles.¹⁵²

Many developing countries like Kenya have opted for reform principles that have been tried in the developed countries for several reasons:

The first and foremost reason is that the developed countries serve as models, and similar systems and structures are, at least in theory, expected to be replicated in the developing countries.

Another associated factor was the relationship of dependency generated both as a historical legacy whereby the colonial powers were able to impose their view of development as well as contemporary geo-political and commercial factors. The role and influence of international organizations occupy a particularly vital role in the latter case. Conditional loans and assistance from the World Bank and International Monetary Fund, on which many developing countries are dependant often require the adoption of neo-liberal economic policies in promoting development.¹⁵³ Indeed it is against this background that the privatization reforms in Kenya can be traced.

The Development of Privatization of Public Enterprises in Kenya:

Privatization of public services in Kenya can be traced back to 1979 when the Kenyan Government obtained a structural adjustment loan from the World Bank in the wake of the economic crisis occasioned by the international oil crisis of that year.¹⁵⁴ Pursuant to the dictates of the World Bank, the government appointed an advisory committee to supervise and direct public enterprises and introduced several policy

¹⁵¹ Ibid

¹⁵² Ibid.

¹⁵³ One of the cardinal pillars of neo-liberal economic policies is the adoption of free-market principles in every economic sphere of an economy making little distinction between public and private sectors- See Haggard, Stephan, Jean-Dominique Lafay, and Christian Morrison, *The Political Feasibility of Adjustment in Developing Countries*. Paris: Development Centre of the Organization for Economic Co-operation and Development 1995.

¹⁵⁴ J.M. Migai Akech, "*The State and Markets in Development: The Kenyan Case*". JSD Dissertation, New York University, New York 2003, 71.

papers in which it declared its intention to privatize public enterprises.¹⁵⁵ The government then formed a task force on the divestiture of government investments, which in turn formed a “Divestiture Advisory Committee” to “propose the objectives to be pursued and procedures to be followed in undertaking privatization.”¹⁵⁶ Later government plans and policy papers were emphatic on the government’s commitment to privatization.¹⁵⁷ In reality however the government had no intention to privatize the public enterprises and these policy papers, development plans, working parties, task forces and advisory committees were only meant to convince the international financial institutions that its economic policies were aligned to the requirements of these institutions in order to obtain funds which it sorely needed.¹⁵⁸ Save for a few divestitures in public enterprises, the first decade recorded very little privatization activity.¹⁵⁹ An ad hoc approach to privatization followed until 1992 when the government decided to establish a number of institutions to handle the privatization process pursuant to a policy paper published in that year.¹⁶⁰

According to the policy paper, the objectives of the exercise were: to enhance the role of the private sector, reduce the dependence of public enterprises on the Exchequer, reduce the role and rationalize the operations of the public sector, improve the regulatory environment, broaden the ownership base and enhance capital market development. Clearly one sees a striking similarity between the objectives of this policy paper and the broad rationale behind the privatization agenda in the developed countries presented earlier in this paper.¹⁶¹ Public interest issues in the context of privatization of public enterprises were not of any significant consideration and we shall be arguing later that it is on the basis of this parochial criterion that procedural fairness issues have suffered a similar fate.

The policy paper also classified public enterprises in two categories; strategic and non-strategic. All the public enterprises under the latter category were to be

¹⁵⁵ S.M. Mwale, “Genesis and Evolution of Privatization Policy in Kenya, in *The Context of Privatization in Kenya*” 59 at 68 (P. Anyang’ Nyong’o et al, eds, 2000) ; Republic of Kenya Sessional Paper No. 4 on Development Prospects and Policies, 1982

¹⁵⁶ Ibid 72

¹⁵⁷ See Republic of Kenya, Development Plan 1984-1988, 1984; Republic of Kenya, Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth, 1986.

¹⁵⁸ Migai (n.6) above) 72

¹⁵⁹ The major activity during the period was the government’s sale of twenty per cent of the shares it held in Kenya Commercial Bank Limited to the public.

¹⁶⁰ Republic of Kenya, Policy Paper on Public Enterprises Reform and Privatization, 1992.

¹⁶¹ See Notes 2, 3 and 4 above.

privatized.¹⁶² Many non-strategic enterprises have since been privatized pursuant to this policy paper.¹⁶³ Indeed towards the end of that decade, the government had undertaken the initial steps to privatize the strategic enterprises, including the Kenya Posts and Telecommunications Corporation, the Kenya Railways the Kenya Power and Lighting Company Limited and the Kenya Ports Authority.¹⁶⁴ What emerges from the foregoing is that although the privatization process was initially geared towards “non-strategic” public enterprises, in the course of time the process assumed a life of its own and was generally extended to cover virtually every aspect of economic life as we shall see in the case study later. In the circumstances it will be argued that the existing privatization policy in Kenya was crafted with the disengagement of the government from “non-strategic” public enterprises. However, and we shall see from the case study, the same legal and policy framework has been extended to govern the privatization of essential or “strategic” public services.¹⁶⁵

In our view this position has created a disconnect in the sense that a sustainable privatization policy must take into account the socio-economic context under which the same operates – a standard template policy may not suffice in view of peculiar ramifications that may arise as a result of such application, the question of procedural fairness being foremost in the circumstances.

It should also be noted that at this particular point in time, the privatization process was undertaken in the context of weak institutional arrangements and without a proper legal framework.¹⁶⁶ For example the ESTU lacked legal status, capacity and authority and had no powers to enforce its decisions.¹⁶⁷ In many cases it was required to defer to the government on many issues thereby hindering its work considerably.¹⁶⁸ Further decisions that were supposed to be made by the ESTU were often made elsewhere coupled with the fact that its mandate was merely to recommend the method of privatization of a particular enterprise reviewing bids and then selecting the winning

¹⁶² Supra -note 12 above.

¹⁶³ The quintessential example under this category has been the privatization of Kenya Airways.

¹⁶⁴ Migai (n.7) above at 73

¹⁶⁵ For example a reading of the preamble to The Privatization Act, 2005 together with Section 18 of the same indicates that the major driving factor behind privatization of public assets or services is not a question of their strategic or non strategic importance but market economy based considerations.

¹⁶⁶ The principle institutions during this period were the Parastatal Reform Policy Committee (PRPC) and the Executive Secretariat and Technical Unit (ESTU). The former’s role included supervision and co-ordination of the privatization programme and setting operational guidelines for the ESTU. The ESTU on the other hand was responsible for the day-to-day management of the privatization programme including the preparation of candidates for privatization, organizing the bidding process, receiving and evaluating offers.

¹⁶⁷ Migai (n.154) above 75.

¹⁶⁸ Ibid

bid.¹⁶⁹This lack of final authority undermined the reputation of the ESTU to a point that it became irrelevant and was disbanded by the government in 2000.¹⁷⁰

These institutional weaknesses made the privatization programme amenable to political manipulation which resulted in the abuse of whatever procedural requirements in existence under the ESTU and PRPC privatization regime.¹⁷¹

In the wake of these irregularities, members of Parliament called for the enactment of laws on privatization and public procurement. This resulted in the enactment of The Privatization Act¹⁷² and The Public Procurement and Disposal Act.¹⁷³

The influence of the Western donor community and the International Financial Institutions such as the World Bank and The International Monetary Fund was also critical in the enactment of these two pieces of legislation.¹⁷⁴ Indeed the then Kenyan Assistant Minister for Finance, Honourable Mutua Katuku had this to say on the passing of the said legislation:

“We [the government] have passed all the major legislation (requested by the donors...) I can say this was the last hurdle”¹⁷⁵(Emphasis ours).

It was against that background that the privatization process in Kenya took root. The novel concept of contractualisation of public services as in the case study also emerged in the period more or less prior to the enactment of Privatization-related legislation.

We shall now look at the case study in detail with a view to establishing the possible accountability deficits, if any, that may be engendered by the privatization of a public

¹⁶⁹ Ibid

¹⁷⁰ Ibid at 75-78

¹⁷¹ The undervaluation of assets of public enterprises was a common feature in the programme with politically connected individuals purchasing the assets for a pittance and then re-selling the same at market prices. A good example was the sale of assets of Kenya Railways Corporation and the Kenya Cashew Nuts Factory.

¹⁷² The Privatization Act, 2005

¹⁷³ The Public Procurement and Disposal Act, 2005

¹⁷⁴ See Kevin K.J., “*No Privatisation, No Aid, World Bank Warns Kenya*,” The East African, Nairobi, November 3, 2003

¹⁷⁵ See Reuters “*Kenya Passes New Privatisation Law*,” August 14, 2005 at

<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021301.htm> last visited August 23 2006.

service from the perspective of an individual citizen¹⁷⁶. This will be juxtaposed later on in the chapter with our findings in Chapter One.

The Case Study Contract

Nairobi City Council and Adopt- A-Light Limited – Project Agreement dated 28th March 2004 and The Council Resolution of 7th October 2004 (“the Contract”)

The contract between Nairobi City Council (“the Council”), a public local authority incorporated under the Local Government Act¹⁷⁷ and Adopt-A-Light Limited (“the Operator”), a private limited liability company incorporated under the Companies Act¹⁷⁸ was consummated via a “project agreement” between the parties dated the 28th of March 2002.¹⁷⁹ In addition to the contract dated 28th March 2002 it should be noted that the parties herein also consummated a contract by way of a full Council Resolution of the 7th October 2004.¹⁸⁰ Under this resolution the Council and the company agreed to form a public-private partnership under which they would form a joint venture company. The shareholding of the joint venture company would be in the ratio of 80% for Adopt-a-Light Company Limited and 20% for the Council respectively. Under this singly sourced arrangement all the advertising revenue within the City of Nairobi would be collected by Adopt-a- Light Limited. Twenty per cent of the revenue would then be ploughed into street lighting infrastructure while the surplus profit (if any) would be shared between the Council and the company in their respective shareholding. The joint venture company would also act as the regulator for the outdoor advertising sector within the City of Nairobi.¹⁸¹ It is instructive to

¹⁷⁶ Within the context of this paper public services may be equated with the role of government in providing public goods that are both non-excludable and non-rival, such as defence and criminal justice. There are no identifiable individual consumers of such government functions, which are performed by the state for citizens generally. Because the services are not marketable they cannot be charged for directly, so are financed from general taxation. There is no choice whether to receive the services, other than by influencing policy decisions regarding their provision- See Peter Vincent- Jones, *“Citizens Redress in Public Contracting For Human Services”*, Volume 68(6) *The Modern Law Review* 2005, Blackwell Publishing, Oxford.890

¹⁷⁷ Section 12 Chapter 265 of the Laws of Kenya.

¹⁷⁸ Chapter 486 of the Laws of Kenya.

¹⁷⁹ This particular contract was the subject matter of between Outdoor Advertising Association of Kenya vs. City Council of Nairobi, Adopt-a-Light Limited and Another (Milimani High Court Civil Case No.131 of 2003) which was struck out by the High Court on a technicality. An appeal has been lodged by the Association in the Court of Appeal to challenge the dismissal of the suit. Pending the disposal of the suit the contract continues to be in force and forms the basis of this paper’s discussion.

¹⁸⁰ See Minute 14 entitled *“Entrenchment Partnership-Adopt-A-Light Company”* of the Minutes of the Nairobi City Council of 7th October 2004.

¹⁸¹ This particular arrangement was subsequently been nullified by the High Court following the commencement of judicial review proceedings by Monier 2000 Limited and 7 Others vs. The City Council of Nairobi & 2 Others in High Court Miscellaneous Civil Application No.1406 of 2004.

note that the said contracts were negotiated and sealed during the period of a weak privatization and public procurement regime as seen earlier in this chapter .In the circumstances the Council singly sourced the contract to the Operator in the absence of any specific legal framework governing the procurement of such public services.¹⁸²

Salient Terms of the Contract:

Under the contract the Council awarded the Operator “the sole and exclusive right to use the street light poles on the approved streets for the purposes set out in this agreement on the terms and conditions set out in this agreement”.¹⁸³ Under the Exclusivity Clause¹⁸⁴ the contract also restricted the Council from inter alia:

- (i) Directly or indirectly competing with the operator in advertising or permitting others to place any form of advertisement on the designated street poles.
- (ii) Renewing any existing advertisement contract currently on the street poles upon expiry of the same during the currency of the agreement with the Operator.
- (iii) Allowing other structures on which advertising is displayed to be erected so close to the street poles that the effectiveness of the message displayed in the advertisements on the street poles is adversely affected.
- (iv) Authorizing the placing of any posters, placards, signs, announcements, stickers, or advertising, marketing or promotion of any form on any street poles and to refer all requests for such authorizations to the Operator.

Under the agreement the Council was also to provide the labour for the carrying out of the project.

On the other hand, other than the obligation to use advertising frames whose design was to be duly approved by the Council, the contract lay little other requirements on the part of the Operator.

The duration of the contract would be five years renewable automatically at the end of every five years – for an indefinite period – as long as the Operator was not

¹⁸² The Public Procurement and Disposal Act, 2005 had not yet been enacted at the time of the contract’s award. The legal regime governing public procurement at the consummation of the contract was The Exchequer and Audit Act (Chapter 412) of the Laws of Kenya and The Exchequer and Audit (Procurement) Regulations 2001.

¹⁸³ Clause 2 of the Project Agreement dated 28th March 2002 between Nairobi City Council and Adopt-A- Light Limited.

¹⁸⁴ Ibid Clause 3

in breach of its obligations under the contract.¹⁸⁵ In terms of consideration the Operator would “finance the initial project set up costs through the creation of the necessary awareness of the project thus enabling advertisers to be drawn to the project with the aim of executing the various phases either individually or collectively”,¹⁸⁶

The Council was also obligated under the contract to authorize the Operator to remove any unauthorized posters, placards, signs, announcements, stickers, advertising, marketing or promotion of any form, graffiti and other clutter on the designated street poles. The Council was further required to prosecute; persons transgressing on the Operator’s designated street poles without delay.¹⁸⁷

According to the provisions of the agreement the Operator would not be liable to pay the Council for any advertisements on the street poles. In other words the operator won savvy concessions including a waiver of rates that other advertising firms pay to the Council. The contract was also silent about the payment of power consumption on the advertising bill boards erected on the street poles. Reports however indicate that the Council ended up paying for the electricity consumed by the Operator’s billboards.¹⁸⁸ No mention with regard to the level of service delivery on the part of the Operator is made in the contract- a serious omission given that this is a contract which ultimately deals with service delivery to the public in the sense that street lighting and, to an extent advertising on public infrastructure is a public service.¹⁸⁹

Clearly what emerges from the foregoing arrangements between the Council and the Operator is a situation where public resources are expended towards private ends with little or no public accountability demanded on the part of the Operator. Furthermore, and as we saw in Chapter One in a situation where a citizen is aggrieved by the Operator’s conduct in the provision of the contracted services the public law remedies are not available to such a person. On the other hand access to private law remedies is curtailed by virtue of lack of privity of contract between the individual citizen and the public service provider.

¹⁸⁵ The Project Agreement –supra 3

¹⁸⁶ Ibid, 4

¹⁸⁷ Ibid,6

¹⁸⁸ See Ochieng’ Rapuro’s Article, “*There Is Need For State To Audit Public-Private Deals*”, The Standard, 21st March 2006

¹⁸⁹ See Peter Vincent Jones (n.21 above).

In addition to the question of ousting public law remedies from the citizen the process of contractualisation of public services raises two other difficult and important issues about the balance of market forms (contractualisation) of accountability and traditional public modes of accountability.¹⁹⁰

Firstly is the impact of contractualisation on the accountability of government for making the policy with regard to the services the contracted service providers deliver. Participatory democracy as we saw in Chapter One demands that citizens, as stakeholders likely to be affected by a public decision that impacts on their livelihoods, be given a chance for effective involvement in the process of such decision-making. Under the case study there is no evidence of such steps being undertaken by the public authority involved; in this case the City Council of Nairobi.

Secondly, the contract may, or may not; as in the case under study provide a basis for holding private service providers accountable for the manner and quality of services delivered. However such arrangements do not secure accountability for decisions about what services will be provided.¹⁹¹ Such decisions remain the responsibility of the public body which contracted out the public service. In the market, the law of supply and demand determines not only how goods and services are provided but also what goods and services are provided. By contrast, the very reason why government takes responsibility for the provision of services to the public is so that they can be distributed by non-market criteria- so that, for example, the services can be provided to those members of the public who could not afford to pay for them in the market- and for whom the government is socially responsible.¹⁹²

Thus while market criteria may be suitable for judging the way public services are provided, traditional forms of public accountability must nevertheless be sustained and strengthened in order to ensure sound governance. This is due to the fact that the line between policy making and execution under the former circumstances is acutely unclear. Under the given scenario, contractualisation of the public service to a private service provider may engender a situation where a

¹⁹⁰ Cane P, *An Introduction to Administrative Law*(Oxford:Clarendon Press, 3rd Edition)1996 ,273

¹⁹¹ *Ibid.*274

¹⁹² *Ibid.*

public body can easily deny responsibility for policies for which they ought to be accountable to the public by saying that they are matters under the control of the private service provider.¹⁹³ Given the limitations of the law in the control and enforcement of public services provision, particularly in countries like Kenya, the argument that public bodies are legally responsible for the service delivery as well as policy making is of little consolation in such an event. These limitations are also compounded by the fact that the contractualisation process in respect to many public services is often done by public bodies without the dissemination of sufficient knowledge to members of the public on such developments. The latter often get to know of the developments when the services are already contractualised.¹⁹⁴

Contractualisation raises difficult questions with regard to the accountability of the private service provider. Private Service providers are, of course, accountable under their contracts with public bodies- although as we shall see in the case study herein, the degree of accountability was both ill-defined and quite limited in scope. Such accountability is however essentially an internal matter between the contracting parties under the doctrine of privity of contract. In the same vein, and in relation to the services that have been contracted out, the “consumer” may have contractual rights against the private service provider. Thus for example, a company that enters into a contract with Adopt-A-Light Limited for the provision of advertising services on the street poles has contractual rights against the latter as the service provider pursuant to such a contract.

However, in many instances the citizen will not be in such a contractual relationship and yet the contractualisation of the public service has negatively impacted on such a citizen’s private rights.¹⁹⁵ It would seem important therefore, that there be public accountability for the way public services are contracted out as well as for the manner in which they ought to be provided.

In contrast and as we noted earlier, the chief executives of public bodies are responsible to the minister of government in charge of that particular function

¹⁹³ Baldwin R., 51 *Modern Law Review*, (1988) 622

¹⁹⁴ See Jaindi Kisero

¹⁹⁵ Harden I.,: *The Contracting State*, Buckingham, London, 1992, Chapter 5

who in turn is ultimately responsible to Parliament- the apex of public accountability forii.

It is therefore little wonder that the exclusivity and lop-sided nature of the contract under study have raised a number of issues germane to warrant the discussion.

Legal Critique of the Contract:

The contractual arrangement between the Council and the Operator raises some critical legal issues.

It is however important at the outset to highlight four crucial components of the contractualisation;

- i) The Joint Company was to be owned 20% by the Council and 80% by Adopt-A-Light Limited. The Council would be a minority shareholder and the joint company would in law be a private company.
- ii) The Council would delegate its statutory powers to collect all advertising rates/fees to the Joint Company.
- iii) The advertising revenue collected would in the first instance be banked in an escrow account and distributed at the agreed ratio of 80% to the company and 20% to the Council.
- iv) The Joint Company, a private company, would take over the Council's function of providing street lighting and beautification of the City of Nairobi.

Illegalities

The Council herein is the legal custodian of the rate payers' funds of the City of Nairobi and it owes the rate payers and inhabitants a duty to protect the revenue it extracts from them.

By resolving to cede 80% of that revenue to a private company and furthermore by doing so without following the procedures set out in law then such a decision is clearly *ultra vires*.

Procurement for Street Lighting Services:

As set out above by virtue of the resolution of 7th October 2004 the Joint Company, which was to be a private company in which the Council would have a minority 20%

stake, would undertake street lighting and beautification of the City of Nairobi. This is a violation of the express provisions of two statutes;

1. Section 143 of the Local Government Act,¹⁹⁶ and
2. The Exchequer and Audit Act (Public Procurement) Regulations, 2001 made under The Exchequer and Audit Act.¹⁹⁷

Section 143, CAP 265

Section 143 (4) (a) CAP 265 provides, inter alia and as far as is relevant to this case, that;

“...a local authority shall...before entering into any contract for the execution of any works or the supply of any goods to the value of ten thousand shillings or more, give not less than fourteen days notice in one or more newspapers or journal of such proposed contract and the purposes and other relevant particulars thereof, and shall, by such notice, invite any person willing to undertake the same to submit a tender thereof by a stated date to such local authority ...”

The Council did not advertise and call for tenders for the carrying out of the works needed to provide street lighting as required under this section. Under Section 160(p) (i) of The Local Government Act, the Council is charged with the duty of providing street lighting of the City of Nairobi. The section aforesaid is clearly worded as to require the Council to provide the said service of “...lighting ...” or “...arrange ...” for the same including the “...erection and maintenance of lamps for that purpose”

As seen from the foregoing the Council elected not to provide the service directly but to instead to “...arrange...” for the same by a private third party in complete disregard of all statutory and procedural requirements.

By the resolution of 7th October 2004 the said service is to be undertaken by the Joint Company. The Joint Company as is clear from the resolution will be a private company, albeit one in which the Council will have some shares.

It is a basic tenet of company law that a limited liability company is distinct from its shareholders.¹⁹⁸ In the case of a minority shareholder one cannot invoke the doctrine

¹⁹⁶ Chapter 265 of the Laws of Kenya

¹⁹⁷ Chapter 412 of the Laws of Kenya

¹⁹⁸ Salomon vs.A Salomon & Company Limited [1897] AC, 22 HL.

of agency even where the company may in some cases be treated as essentially the shareholder under a different guise.

Therefore the argument that the resolution would create a partnership as opposed to an independent private company is not an answer to the requirement of Section 143 of The Local Government Act.¹⁹⁹

If the Council was to invest in private companies as a minority partner it can do so. However the Company that results from that partnership cannot by virtue of the Council's minority stake be exempt from bidding for public works or from the statutory provisions of the aforesaid section.

This case must be distinguished from cases where a Local Authority commercializes a function by creating a wholly owned company to run such a function as has happened with water and sewerage services country wide. In the instant case the Council has granted a statutory duty to a private company.

The Exchequer and Audit (Public Procurement) Regulations, 2001²⁰⁰

In addition to the procurement requirements in CAP 265 above cited it is clear that the Council is subject to and violated the detailed provisions of The Exchequer And Audit (Public Procurement) Regulations ,2001 (hereinafter called The Procurement Regulations)

Applicability and scope of the Procurement Regulations;

The said Regulations are made under Section 5A of The Exchequer and Audit Act, Chapter 412.

The section provides, inter alia

“...Notwithstanding any other provision of this act and any other written law to the contrary, the Minister may, in regulations prescribe the procedure to be followed by any public entity in procuring goods and services out of public funds ...”

¹⁹⁹ Section 143 of the Local Government Act Chapter 265 of the Laws of Kenya clearly stipulates the procedural requirements which must be observed in the process of contracting out for the provision of goods and services.

²⁰⁰ The Rules are made pursuant to Section 5A of the Exchequer and Audit Act, Chapter 412 of the Laws of Kenya.

Most important to note is that the section 5A is expressed to be notwithstanding any other written law.

It was therefore the intention of Parliament to override any law on procurement that was contrary to the proposed Regulation and also to ensure that all public entities would be governed by the said Regulations.

Section 5A of Chapter 412, came into force vide Act 9 of 2000, well after Section 143 CAP 265. By Legal Notice 51 of 2001 The Procurement Regulations came into force. Under Section 5A (2) (a), Chapter 412, a local authority is a public entity for purposes of the Regulations.

Violation of the Regulations by the Council.

As indicated earlier the resolution of 7th October 2004 in a broad sweep approved the formation of the joint company and delegated its statutory duty to provide street lighting to that company.

This was in violation of Regulation 17 (1) of the Procurement Regulations which required the Council to use Open Tendering as the preferred procedure of procurement.

Under Regulation 17(2) the Council was required to record in writing reasons for using direct procurement which was the method used in the sweeping resolution granting the job to the joint company.

Again, as in Section 143 of the Local Government Act the Regulations do not exempt a local authority from the Regulations where the company to undertake the works is one in which the procuring entity has a minority stake.

It is therefore arguable that the resolution of 7th October 2004 granting to the proposed joint company the work of erecting and maintaining street lighting in breach of the statutory regulations was illegal. Regulation 19 of The Procurement Regulations does allow the use of direct procurement apart from under the limited instances set out in Regulation 35 and which were not applicable in the instant case. However Regulation 19 is emphatic that direct procurement

“...is not to be resorted to with a view to avoiding possible competition or in a manner which would constitute a means of discrimination among candidates...”

The facts and circumstances of this case clearly show that the purpose of procuring directly from the proposed joint company was to not only avoid competition from other competitors but to create a situation in which the joint company would have a

clear advantage over the competition by purporting to have been exempted from statutory provisions with respect to public procurement, and that notwithstanding the fact that the Council as a public body was a minority shareholder in a private enterprise.

Breach of Law

It is now settled law that where Parliament has entrusted a local authority with executive discretion the purported exercise of such discretion can be challenged if the authority proceeds in a manner not prescribed by statute and further if it fails to take into account factors that it ought to consider.²⁰¹

Ultra Vires

As indicated at the outset the resolution of 7th October 2004 has four key components.

- i) It delegates the statutory revenue collection mandate of the Council to the proposed Joint Company.
- ii) It cedes 80% of all the revenues from advertising to the joint company.
- iii) It gives the joint company monopoly in the provision of street lighting.
- iv) The joint company will be a private company. The Council will hold only 20% while the Operator would hold 80% of the shareholding in the same.

Power to Levy and Collect Revenue

The power to levy charges and impose fees is a statutory power given to the Council under section 148 of the Local Government Act.²⁰²

The said section does not authorize the Council to delegate the said power.

This should be contrasted with instances in the Act, where the power to delegate or outsource specific functions is granted e.g. under Section 153 9(b) with regard to Omnibus Services as well as the power to provide street lighting that we have dealt with hereinabove under Section 160(p) (a).

If parliament had wanted to allow the Council to delegate its revenue collection function it would have said so *expressio unis est exclusio alterus*.

The only authority to delegate all functions generally is found in section 196 of the Act. This is however limited to delegation by the council to a county division but not to a private company. It is therefore clear that the Council has the option of

²⁰¹ Associated Provincial Picture House Ltd vs. Wednesbury Corporation(1947) 2 ALL ER.680 and R. vs. Judicial Service Commission Ex parte Pareno (2004) K.L.R. 203

²⁰² Chapter 265 of the Laws of Kenya.

outsourcing its functions without ceding its statutory responsibilities under the aforesaid provisions of The Local Government Act. Indeed the Council has successfully applied this avenue in the outsourcing of market cleaning services and the provision of water and sewerage services to entities under its control.²⁰³ It is therefore possible for the Council to explore existing legal avenues by which public services under its remit may be provided by third parties without wresting the residual statutory responsibility of the services from the Council.

The responsibility for implementing the revenue collection function and recovery of monies due to a local authority is vested with the Chief Financial Officer, in this case the Treasurer of the Council under rule 13 of the third schedule-part II of the Local Government Act, Chapter 265 of the laws of Kenya.

In conclusion we submit that in the absence of an express power to delegate the revenue collection function and in light of the express vesting of the power in the Council and apportioning of the responsibility to its chief Financial Officer the decision of the Council of 7th October 2004 was *ultra vires* the Local Government Act section 148 to the extent that it purports to empower a private company to collect all advertising fees.

Revenue Split between the Council and the Operator.

The resolution of 7th October 2004 requires the Council to cede 80% of all the said advertising revenue which will be collected by the joint company to the said company.

This violates the express provisions of Part XV of the Local Government Act, (Sections 212-221).²⁰⁴

Public Accountability:

Part XV of the Act is a detailed and elaborate statutory code whose purpose is to ensure that;

- i) The collection of all revenues due to Local Authorities is monitored.
- ii) The said revenue is put into designated rates funds.

²⁰³ For example the Nairobi Water and Sewerage Service Company Limited is a private company wholly owned by the Council and to which the Council has outsourced water and sewerage services within the City of Nairobi. The residual control for the services however remains with the Council.

²⁰⁴ Chapter 265 of the Laws of Kenya.

- iii) The expenditure from the said funds is only done in a prescribed manner that has in-built checks and controls with oversight by the Chief Financial Officer, the full council, the Finance Committee, the Minister and even by inhabitants of the city.

By delegating the revenue collection function to the joint private company and ceding 80% of the said revenue to that company the Council will have effectively circumvented the scrutiny, checks and controls of part XV, of the Local Government Act ²⁰⁵ and placed public funds at the disposal and total discretion of a private company.

Furthermore Section 92(4) of the Local Government Act states that no funds shall be paid out by a local authority unless the expenditure thereof has been provided for in annual estimates or revised or supplementary estimates of the Local authority.

By ceding 80% of its advertising revenue to the joint company the Council has violated Section 92 (4). The joint company being a private company in which the Council holds a minority 20% stake is not governed by the Local Government Act.

The private company will not be required to submit any estimates of how it intends to spend the 80% revenue it will receive from advertising rates and fees.

Under section 212 (9) Residents of Nairobi are entitled to demand for copies of the estimates of Income and Expenditure to enable them scrutinize how the Council is collecting and using the revenues

The joint company, being a private company, will not be required to give details of the income and expenditure to the council. Residents of Nairobi will therefore have no right to see and know how much was collected and how it was used. The joint company will be at liberty to use the revenue as it pleases.

Under section 214 (1) of the Local Government Act the Council is bound to incur expenditure only as per its published and approved estimates.

This is a further check to ensure that any diversion from the estimates is not allowed. Again this will not apply to the joint company.

Section 216 (2) of the Act further provides that all receipts by a Local Authority shall be carried to the general rates funds. The section is crafted to ensure that all revenue is first receipted and accounted for in the General rates funds.

Allowing the Joint Company to collect all advertising revenue and to retain and expend 80% circumvents this statutory check and control. Once receipted to the

²⁰⁵ Ibid.

General rates Fund under Section 216 (2) the monies can only be paid out on the basis of the estimates as earlier set out.

Rationale of Part XV of The Local Government Act

Clearly the rationale behind these provisions is to ensure that the revenues due to the Council, being public funds are accounted for in a transparent manner at every stage. i.e. both the income as well as the expenditure.

The accounts and procedures created by part XV also ensure a clear paper trail of income and expenditure thus ensuring greater transparency and accountability.

The estimates further ensure scrutiny that the funds are being used prudently and transparently.

As we have seen from the foregoing analysis the law clearly does not allow the Council to pass on public funds to a private entity in the manner envisaged under the contract. Therefore in the event that the function of collecting such revenue is contracted out to a private entity such as the Operator then such accountability requirements shall not be available to the public- even though the Operator is dealing with public funds. Furthermore no performance indicators or deliverables have been set for the Operator under the contract greatly compromising public accountability and rendering the whole question of scrutiny into a highly opaque affair. As we have seen from the foregoing analysis the law clearly does not allow the Council to pass on public funds to a private entity in the manner envisaged under the contract.

The Public Law Issues in the Case Study:

Firstly, it has been criticized on the front of public accountability. In this sense the legality of using public funds to subsidize the operations of a private company as noted hereinabove raises the question of whether the Council has the mandate to be part of a decision, being a public body, which is clearly not in the public's interest. In any event the decision itself has been effected with little or no public participation in line with the demands of participatory democracy.

Secondly by restricting participation to one player, the Council has denied other players, who are affected by that decision, a chance to grow wiping with it hundreds of potential livelihoods that such affected players could support.²⁰⁶ At another level it has also been argued that such a monopolistic mode of operation by the Operator in

²⁰⁶ Rapuro (n.31 above).

the circumstances denies the government revenue it would collect in the form of corporate taxes from players that have been denied their rights to participate in their lawful line of business.²⁰⁷

Most importantly however, it has been argued from an economic point of view that the issue of leaving a big slice of the outdoor advertising business²⁰⁸ in the hands of one player is a recipe for a decline in the quality of services offered and ultimately the collapse of such a sector.²⁰⁹ This is particularly acute in the event where the individual's redress with regard to issues arising from the provision of such services is curtailed as we saw in Chapter One.

Clearly the issues under consideration pose considerable concern to the individual citizen whose livelihood or lifestyle may have been affected in one way or the other by the decision. Under such circumstances such an individual would be in a position to access public law remedies to pursue his rights. The action of the Council would in normal circumstances fall within the realm of public law. Under public law, and as we saw in Chapter One, remedies exist to individual citizens under which they can enforce their rights against public bodies for public law infringements. However as we saw earlier citizens whose rights have been curtailed by the implementation of such a decision by a public body may only seek to challenge the same on public law grounds in pursuance of public law remedies. Public law remedies can however be extinguished by legal process such as the contractualisation of a public service by a public body to a private body, the latter being governed by private law. In other words a litigant who seeks redress for a public law wrong in a private action must establish, in order to have standing, that the public wrong has invaded some legal right of his or hers, recognized in private law, or has caused him or her some special damage.²¹⁰

Indeed the public nature of the Council's functions with regard to the provision of public services clearly emerges from the fact such functions and activities are governed by statute.²¹¹

²⁰⁷ Ibid.

²⁰⁸ It has for example been estimated that the annual advertising business revenue in Kenya amounts to about Kshs. One Billion. Out of that figure 80% of the revenue is derived from the Operator's area of jurisdiction-See Rapuro-supra.

²⁰⁹

²¹⁰ *Gouriet v Union of Post Office Workers* (1978) AC 435.

²¹¹ The Local Government Act, Chapter 265 of the laws of Kenya.

The preamble to the Local Government Act defines the statute as

“an Act of Parliament to provide for the establishment of authorities for local government; to define their functions and to provide for matters connected therewith and incidental thereto”

With regard to public streets the Act vests their general control and care to the local authority under whose jurisdiction such streets fall. Such a local authority is to keep and maintain the same for the use and benefit of the public.²¹² The public service nature with regard to matters ancillary to public streets is further bolstered by provisions in the Streets Adoption Act.²¹³

The purposes of the Act are:

“to regulate the construction and improvement of streets in certain local authority areas; to provide for the adoption by certain local authorities of streets of a satisfactory standard; and to provide for matters connected with the foregoing and incidental thereto.”²¹⁴

While section 143(1) empowers local authorities to enter into contracts necessary for the discharge of their functions it is clear from a reading of that section that the genre of contracts envisaged under the statute are not for contracting out of a local authority’s function. It covers the realm of routine contracts ancillary to the smooth day to day running of the local authority e.g. supply of general consumables. It would be illogical for a statute that vests a public authority with specific functions to simultaneously contain open ended provisions for the ouster of such functions from the exercise of that public authority.

Clearly what emerges from the foregoing statutes is that the function and control of streets (including street lighting) in local authorities is a public function vested upon public bodies. Decisions arising from such functions would in the circumstances be open to judicial review to an individual citizen aggrieved by the same in line with the law.

Contractualisation of these services or elements of the same to private entities on the other hand engenders a situation where such an individual does not have access to

²¹² Ibid, Section 182(1)

²¹³ Chapter 406 of the Laws of Kenya.

²¹⁴ Ibid, Preamble

such remedies on the grounds that remedies against a non-public entity, such as a company are based solely on contract. In such cases the only remedies that would be available are private law remedies.²¹⁵ Under the circumstances in the case study it is clear that the individual citizen will be at a loss insofar as public law remedies against a contracted service provider are concerned. The public law remedies previously available to him are extinguished by virtue of the contractualisation process. On the other hand he has no privity of contract with the contracted service provider and can therefore not institute private law remedies against the latter. This is a likely scenario for the individual citizen under the arrangements in the case study.

Courts have fastidiously recognized this divide between private law remedies and public law remedies insofar as when the same are available to a private individual. In the English case of Gouriet .vs. Union of Post Office Workers,²¹⁶ the applicant in an action for judicial review sought an injunction to restrain the union, a private body, from instructing its members to boycott mail to South Africa as a protest against the South African government's policy on apartheid. The Attorney-General refused to lend his name to the action, and the House of Lords held that his refusal could not be challenged by an individual in an action for judicial review on the basis that the applicant was seeking to enforce a private law action by means of a public law remedy.

Kenyan courts have taken a similar position as that of the English courts. In the case of Stephen Kamanga Ng'ang'a vs. Kenya National Library Services Board²¹⁷ the applicant who was the Managing Director of the respondent corporation brought an action by way of judicial review seeking to restrain it from transferring him to the Ministry of Trade and Industry as a Chief Documentalist and Information Officer. The applicant also sought interim orders for an injunction restraining the respondent from terminating his contract of employment with the said organization. In dismissing the applicant's case Ojwang' J noted:

“The statutory corporation is set up essentially to perform public functions in respect of which, in broad terms, government has social responsibility. So in the legislative design, KNLS though a juristic person, has public character

²¹⁵ Cane P, *An Introduction to Administrative Law* (3rd Edition), Oxford University Press. Oxford, 1996 8.

²¹⁶ *Supra* (n.60) above.

²¹⁷ <http://www.kenyalaw.org> eKLR High Court at Nairobi September 26, 2005.

and serves public cause under the superintendency of a minister of the government.”²¹⁸

In the circumstances the learned judge found that the remedy sought by the applicant was a private law remedy which could not be enforced in a public law forum less so through means of a public law remedy.

CONCLUSION:

We have traced the historical development of the process of privatization of public services in Kenya and established that the public interest in the context of such privatization has been narrow and largely restricted to the interests of the political elite and not to the consumers. The influence of external forces such as donor countries and international financial agencies has also been noted as one of the key drivers in the privatization discourse in Kenya. It was in that environment that the case study under discussion was birthed. Consequently the interests of ordinary citizens, as major stakeholders in the process especially in the context of access to procedural fairness in the contracting out of such public services to private entities received a wide berth during these developments. A critical analysis of the contract under study reveals a carry-over of this state of affairs. Public accountability deficits are also evident from the contents of the contract and which deficits would ordinarily be addressed and cured by procedural fairness and remedies thereof in the event of breach of the same under public law. Such deficits have been occasioned by the fact that public law functions have been ousted from the regime of public law by the process of contracting out the same to a private entity. In the absence of privity of contract an individual's rights with regard to the provision of the public service are greatly curtailed by the fact that private law remedies are not within his reach.

On the other hand the public law remedies previously available to such a citizen are inaccessible under the new dispensation for the reason that such functions are within the regime of public law.

Critically important too is that by stressing the values of market privatization public authorities can effectively put the activities of public bodies more or less beyond the reach of traditional forms of political control which is a vital aspect of public accountability in a democratic society. In this sense procedural fairness would require

²¹⁸ Ibid

that the City Council of Nairobi, as a public body, take such steps as to ensure that decisions undertaken take into account the objectives set by statutory provisions and other governmental regulations, collect information, evaluate the possible alternative solutions, determine the best options available, assess the different ways of implementing such a decision and appraising of the possible effects on the public interest or relevant parties and individuals –the ultimate aim of such procedures being to ensure a level of protection to those individuals and groups who think their rights and interests may or have been undermined through its administrative decision-making process. Procedural fairness also demands that the whole exercise of placing the role of public authorities be handled in the most open manner. There must be strict guidelines and processes to ensure that the service, in this case, street lighting is done in accordance to proper technical specifications and maintained at acceptable levels as would be demanded by the public in the event that the function was been operated by a public authority. This means that supervision and regulation of the private service is absolutely necessary. To the extent that a public agency, in the case study being the Nairobi City Council, delegating regulatory tasks to a private actor, Adopt-a-Light Limited, procedural fairness demands the latter to be adequately constrained by both mandatory procedures and rigorous oversight from an independent agency. In other words if a private actor is permitted to share standard- setting authority in a given function or assume the enforcement responsibility that lies with a public body it is only fair that there be significant limits on the private actor's authority. In essence therefore for a contractual regime under privatization to produce any meaningful accountability there has to be significant development in the monitoring capacity to oversee the quality of the contracted services and to ensure that any complaints by the public in regard to the said services are adequately addressed.

The existing accountability mechanisms which are currently largely vested in the Local Government structure of mayors and councillors is clearly not adequate given their capacity to deal with such complex issues- effectively denying the public any form of democratic participation in the privatization process.

As we have seen from the case study these considerations were not given due consideration thus denying the public citizen the right to effectively participate both in the policy decision to privatize and the superintendence of the private service provider in the provision of a public function. In other words the demands of procedural fairness have clearly been flouted in the whole process.

As indicated in the earlier part of the Chapter, it was this untidy state of affairs of the privatization process that led to the clamour for the enactment of a legal framework for privatization. In the next Chapter we will critically examine that legal framework from the perspective of procedural fairness to establish whether any meaningful developments have evolved as a result of such legislation.

CHAPTER THREE

Procedural Fairness Utility under Kenyan Privatization Legislation

Introduction:

In chapter one of this paper we established the jurisprudential basis behind procedural fairness and also analyzed the major ingredients that ought to be incorporated in processes that lay claim to procedural fairness compliance.

Chapter two proceeded to present the historical background that informed the genesis of privatization in Kenya. The chapter also considered the case under study with a view to establishing the degree of compliance on matters of procedural fairness. In this chapter, we shall endeavour to undertake a similar diagnosis in the context of current legislation, and in particular the Privatization Act in Kenya regarding the privatization of public services. The basic objective, as in the preceding chapters will be to investigate the degree to which these laws address the question of procedural fairness and specifically in the context of the case study.

Our investigation in this sense will largely be informed on the argument that the goal of responsive law should be to foster qualities of good administration and respect for fundamental public interest values within the range of a private body performing a public service function.²¹⁹ Additionally procedural fairness requires a certain mode of participation of citizens in public decision-making that affects them in one way or the other. Accordingly procedural fairness allows more participation in decision-making and participation allows prevents elements of arbitrariness and uncertainty. Moreover, participation, per se, gives rise to social and individual improvement which is the cornerstone of all open government. From this, a sense of legitimacy is found which justifies administrators' decisions in terms of legally and morally acceptable

²¹⁹ See Vincent Jones P.n. (9above) 88.

principles which, in turn, ensure better decisions and outcomes.²²⁰ This is the procedural utility aspect of legislation, which argues that consumers of legislation evaluate the legitimacy of such legislation not merely on account of its outcomes but also place a premium on the procedure, which leads to the outcome.²²¹

Traditional Utility of Procedural Fairness in Public Service Delivery:

As we saw in chapter two, contracting out of public services poses new challenges for public law relating to accountability, susceptibility to judicial review, and the appropriate procedural and substantive norms to be applied in such circumstances. In the evolution of these developments various benchmarks have been developed in a bid to ameliorate the shortcomings and foster public accountability. Accountability can operate in a number of ways.

From a legislative aspect the empowering legislation that creates the legal framework for the contracting out of public services should clearly state the composition of such a body. The legislation should also indicate the role of government through the relevant Minister within the process of contracting out of public services in a particular sphere thus ensuring a degree of public accountability in the process.²²²

Effective legislation should also be concerned with the accountability of the contracting out institution to the public, either through Parliament or through some other means of public participation.²²³

The traditional notions of ministerial responsibility see accountability in the sense of existing normal departmental responsibility and ultimately to Parliament. This position was set out in the English case of **Carltona Limited vs. Commissioners of Works & Others**²²⁴

In that case the appellants who were manufacturers of food products had their factory requisitioned by the Commissioners of Works under British war-time regulations in 1942. The appellants commenced proceedings against the Commissioners seeking a declaration that the action by the Commissioners was null and void on the ground that the notice was invalid. The sole question before the court related to the validity of the order of the Commissioner of Works in requisitioning the property. The Court held

²²⁰ Galligan, D.J., *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Clarendon Press, 1986, 330-33

²²¹ For a fuller discussion on this aspect see the article by Paul Anand, "*Procedural Fairness in Economics*" at http://www.open.ac.uk/socialsciences/economics/ecosubset/ecointopops/No_27.pdf last visited on 15th September 2006.

²²² Craig P., *Administrative Law*, Sweet & Maxwell, London, 2000, 97.

²²³ *Ibid*

²²⁴ 1943 2All ER 560

that Parliament has committed to the executive the discretion of deciding when an order for the requisition of premises should be made under the regulation and if that discretion is exercised in a *bona fide* manner then no court could interfere with the same.

In the circumstances the law presumes that what the Minister is answerable for he or she also controls, or should do at least in theory.²²⁵ Thus in a formal sense it could be said that the Minister is still responsible for all acts of a public body under his control including the contracting out agency, irrespective of its status and the way in which it operates thus boosting the level of public accountability and sound governance respectively. This is what has now come to be commonly referred to as the *Carltona Principle*.²²⁶

Accountability can also be enhanced from the bottom, through public participation. Thus the body contracting out public services should create legally recognized fora for members of the public to discuss matters of public concern in the contracting out of the public service.²²⁷ The contracting out agencies should therefore be under an obligation to consult the users of the services and other stakeholders on a wide range of issues by means of questionnaires and public meetings.²²⁸

Another vital aspect to consider in the contracting out process involves the question of goal setting and efficiency monitoring. This is normally achieved by means of incorporating legal frameworks placing mandatory obligations on the public body contracting out a public service to put into place systems that for target benchmarking and monitoring the efficiency of the private operator in the achievement of the set targets.²²⁹

Finally, public accountability with regard to contracted out public services has been greatly bolstered by establishing a Citizens Charter spelling out the rights and obligations of an individual vis-à-vis the Government and extending the principles contained in such a document to apply to bodies that contract out public services.²³⁰ The Citizens Charter in this sense provides the conceptual foundation to

²²⁵ Craig (n3) above 100

²²⁶ *Carltona Ltd vs. Commissioner of Works* (1943) 2All E.R. 560

²²⁷ Editorial: "*Quangos and the Structure of British Government*" (1979) 57 Pub.Adm.379 para 25.

²²⁸ *Ibid* para.13

²²⁹ For example in the United Kingdom, the Labour Government has set up the Public Sector Benchmarking Process. See Craig *Supra*.102

²³⁰ The Report on Executive Non-Departmental Public Bodies Cm.4157 (1998).

increase the openness of the contracting out process to the individual citizen, improve citizen access to information and to enhance reasoned decision making.²³¹

Thus in terms of legal frameworks for contracted out public services, we see that the bottom line should be to sharpen public accountability by defining goals, setting standards and monitoring performance. Accountability comes in two senses: process and programme. Process accountability asks whether the procedures used to perform the contracting out were adequate while programme accountability is concerned with the quality of the work being undertaken under the contracting out arrangement and whether it has achieved the goals required of it.²³²

It is upon the foregoing criterion that we shall juxtapose the Kenyan legislation on privatization with a view to establish the degree of convergence with such benchmarks.

The question as to why accountability plays such a fundamental role in the context of contracting out may perhaps be posed.

Democratic Process and Accountability in Public Administration:

The concepts of control and accountability are rooted in the fundamental values of a democratic society. The underlying purpose of accountability should be found in principles of democracy, the rule of law and effective and good governance.²³³

Democratization has now transformed to a serious concern across the world, particularly in transition societies such as Kenya, and it is therefore arguable that the strengthening of procedural fairness in the public domain advances the democratic process. Public administration should thus reflect such a procedural value to produce effective outcomes and secure legal, moral and rational justification for decisions and policies made by public authorities.

As we saw in Chapter One democracy is defined as an institution which enables individuals and groups to race for the people's vote to acquire political decision-making power through the means of competitive struggle.²³⁴

²³¹ The Competitions and Service (Utilities) Act 1992 in the United Kingdom is a good example of legislation that seeks to ensure greater openness and access and information to the citizen during the contracting out process.

²³² Robinson A., "Government Contracting Out for Academic Research: Accountability in the American Experience", Smith and Hague (eds) McMillan 1971 Ch.3

²³³ Zarei M.A.,(n.16) above, 40

²³⁴ Lyland, James L., Democratic Theory: The Philosophical Foundations, Manchester University Press, 1995,163

Under the concept of participatory democracy, it is argued that citizens should be more involved in making public decisions, which for example in the current study would be their input in the process of contracting out public services. The idea behind this is to provide a range of options to be considered in the process and preserve a minimum level of effectiveness of public use of resources and opportunities.²³⁵ In recent representative democracies, due to lack of people's participation, the prospect of serious problems such as misuse of public powers, corruption and extensive violations of individuals' rights and liberties by public officials has become the norm.²³⁶ Participation is based on the principle of equal rights of every citizen in taking part not only in the process of implementation but also in all the stages of setting objectives, policies and programs- thus the need for the preservation of procedural fairness. In addition, participation reduces the opportunities for the arbitrary use of power and public funds by public bodies. Public officials are not only accountable to administrative, political and legal institutions but also to the public in various ways and forms such as consultation, public hearings and inquiries, consumers' organizations, media, social and interest groups. It is therefore clear that the participation of the general citizens in the democratic process of government –or any process that involves issues in the public law domain, such as contracting out of public services is an effective method of reducing the abuse of public powers.²³⁷ Procedural fairness in the circumstances acts as a vanguard in achieving such outcomes.

The Concept of Accountability:

We have seen that the democratization process secures a more effective method of decision-making. In this respect accountability serves the underlying values of democracy such as citizens' rights to participation. Accountability of administrators internally and externally ensures the democratic process of government. In this sense accountability means to be held responsible for or explain ones decision or action to another authority and accept any consequences there from.²³⁸ For public administrators or management, accountability, via the concept of procedural fairness functions as a means of monitoring any wrongdoing and to correct mismanagement or

²³⁵ Zarei (n.233) above 42

²³⁶ Ibid.

²³⁷ Guttmann, Amy, Democracy. In Robert E. Goodin and Philip Petit, Eds. A Companion to Contemporary Political Philosophy, Basil Blackwell Limited, London, 1993 411.

²³⁸ Oakerson R.J., Governance Structures for Enhancing Accountability and Responsiveness. In James L. Perry, ed. *Handbook of Public Administration*. Jossey-Bass Publishers. 1989 114

maladministration and to pursue the efficiency, effectiveness, and responsiveness of government.²³⁹

Accordingly, procedural fairness allows more participation and participation prevents elements of arbitrariness and uncertainty. Moreover, participation, per se would give rise to social and individual improvement, which is the cornerstone of all open government. From this, a sense of legitimacy is found which justifies decisions by public officials in terms of legally and morally acceptable principles, which, in turn, ensure better decisions and outcomes.²⁴⁰ Therefore where administrative decisions, such as contracting out, affect individual rights or interests, procedural fairness requires that participation should take a modified and effective form of adjudicative procedure. In the event that the general interests of a community or groups of people are concerned, then procedural fairness requires both a public hearing and consultation.²⁴¹

Kenyan Privatization Legislation and its Compliance to the Principles of Procedural Fairness:

As we saw at the conclusion of chapter two, the haphazard and opaque nature of the privatization process under the stewardship of the Executive Secretariat and Technical Unit (ESTU) of the Public Enterprise Reform Programme (PRPC) coupled with the demand of the Kenyan development partners acted as the major catalysts in the legislation on privatization related laws.

The Privatization Act, 2005

The Privatization Act²⁴² received presidential assent on 13th October 2005. It was to become operational upon notice from the relevant Minister and which notice at the time of writing this paper was yet to be issued. In the circumstances and in particular due to the fact that the Privatization Appeals Tribunal²⁴³ is yet to be constituted there has not been much jurisprudence with regard to privatization in Kenya as at the time of writing this paper. The record of the Executive Secretariat and Technical Unit of the Public Enterprise reform Programme, the precursor to the envisaged Privatization

²³⁹ Zarei M.A., (n.235) above 43

²⁴⁰ Galligan D.J. Discretionary Powers: A Legal Study of Official Discretion. Clarendon Press, Oxford, 1986:330-33

²⁴¹ Ibid: 337

²⁴² Act No. 2 of 2005.

²⁴³ Established under Part V of The Privatization Act.

Appeals Tribunal, insofar as the creation of a body of jurisprudence relating to procedural fairness in the area of privatization of public services does not hold much either. Perhaps this could be explained by the fact that much of the privatization undertaken under its tenure has not involved the privatization of public services. Rather it has more or less been involved in the privatization of state-owned commercial enterprises. Nevertheless it is clear that the Privatization Appeals Tribunal as an administrative body will certainly play a crucial role insofar as procedural fairness is concerned as soon as the same is established and is in operation. Recent media reports indicate that there has been an expression on the part of Government to extend the contracting out of public services to private operators in fields other than the traditional areas of commercial enterprises. This will include prison management and other related correctional services.²⁴⁴ Furthermore with the official Government policy to privatize all non-strategic enterprises it will undoubtedly emerge that this administrative body has a major role to play in the privatization process.²⁴⁵

The Privatization Act seeks to provide a legal framework:

“to provide for the privatization of public assets and operations, including state corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission to be established by this Act and for related purposes”²⁴⁶

Although the preamble to the Act does not specifically mention the privatization of public services as being within its scope of cover, it is arguable that the use of the term “operations” effectively brings the said category within the ambit of the Act.

Under the definitions “privatization” means

“a transaction or transfer that results in a transfer, other than to a public entity, of any of the following:

- (a) assets of a public entity including the shares in a state corporation.**
- (b) Operational control of assets of a public entity.**
- (c) Operations previously performed by a public entity;”**

²⁴⁴ See Jibril Adan’s Article “Can’t Raise Bail? Talk to the Bond Shylock and Help Decongest the Jails...” Daily Nation, September 21st 2006.

²⁴⁵ See Republic of Kenya, Policy Paper on Public Enterprise and Privatization (1992). Under the paper public enterprises are classified into strategic and non-strategic. The government expressed its intention to retain ownership and control over the former “for the time being” while the latter were to be privatized.

²⁴⁶ See preamble to the Act.

A “public entity” is further defined to include a government department, a state corporation or a local authority.

The Act establishes the Privatization Commission²⁴⁷ whose role is to formulate and supervise the privatization process under section 4 of the Act. Section 17(1) of the Act provides for a privatization programme, which is to be formulated by the Commission and approved by the Cabinet.

A critical consideration of this provision would indicate that the section does not countenance the involvement of users of those public services to be privatized, in this case the general citizenry. No mode of participation on the part of the public is provided for during the privatization process. Neither are there provisions relating to the supervision of agencies undertaking the role of privatized functions by any public administrative agencies. In other words there is no public regulatory body to oversee the conduct of the operator of a given public function once the same is privatized.

(1) Section 18(2) of the Act sets the criteria to be applied in bringing about the privatization of public assets and state corporations.

In a nutshell the overriding consideration that informs the privatization process under the Act is the desire to operate public enterprise and services in line with a market based economy philosophy.

From the foregoing it is clear that the Act does not take into consideration the effects of privatization with regard to accessibility of privatized public services to the individual citizen as one of its objectives. Neither does the Act address the question of accountability to the public in respect to the privatized services.

In terms of procedural accountability the provision requiring the Commission to publish a notice in the Gazette informing the public of the outcome of a given privatization is the only specified requirement under the Act.²⁴⁸ No pre-privatization procedures are demanded on the part of the commission and in particular provisions that would ensure the effective participation of the public during both the privatization and post-privatization process respectively in tandem with the demands of procedural fairness.

²⁴⁷ Supra (n.1) above Section 3.

²⁴⁸ Section 36 of the Privatization Act, 2005

The Act also provides for the execution and implementation of a privatization programme by the responsible public entity outside the privatization programme subject to the conditions imposed by Section 22(2) of the Act.²⁴⁹

The Act further sets out in detail the mode of implementing the privatization process²⁵⁰ and the different methods of privatization envisaged²⁵¹ under the Act.

In terms of objections and appeals with respect to a given privatization, the Act incorporates an in-built process by which the same are handled by the Privatization Appeals Tribunal established under section 44 of the Act.²⁵² While it is evident from the foregoing that the Act provides for some modicum of procedural fairness, the same pre-supposes that any objections with regard to the procedural process relate to a concluded privatization. This is clear from the provisions of Section 37 of the Act which states;

“The Second Schedule shall apply with respect to objections and appeals relating to what has been determined, as published under section 36” (emphasis mine).

In other words the Act has no provisions to provide the public or the individual with an avenue to object to the intended privatization *ab-initio*.

Coupled with the restrictive time limit of seven days within which an objector may file an appeal,²⁵³ and the power of the Appeal Tribunal to require an objector to provide security for costs²⁵⁴ in the event of an appeal to the High Court, the appellate system under the Act proves to be rather unfriendly to the ordinary citizen who would in any event be the consumer of the public service under privatization. It is in the circumstances argued that the participatory element of the public in the process of privatization under the Act is greatly compromised.

Secondly the Act does not specifically provide for administrative review of the decisions of the commission or the Appeals Tribunal²⁵⁵ that would create a window

²⁴⁹ A reading of the section indicates that the aim of the proviso is to ensure that the privatization of all state corporations is carried out strictly under the privatization programme as opposed to other avenues as provided for under Section 22(1) of the Act.

²⁵⁰ Sections 23 and 24

²⁵¹ Under Section 25 of the Act, the methods of privatization include public offering of shares, concessions, leases management contracts, public-private partnerships, negotiated sales, sale of assets or any other method approved by the Cabinet in the specific privatization proposal.

²⁵² Privatization Act, (n.7) above

²⁵³ Rule 3(2) of the Second Schedule to the Privatization Act.

²⁵⁴ Rule 4(4) of the Second Schedule to the Privatization Act.

²⁵⁵ For example Part VII of the Public Procurement and Disposal Act, 2005 has specific provisions for Administrative Review of Procurement Proceedings.

for public accountability and redress in regard to the process is not specifically incorporated into the Act.

From the foregoing it is clear that the Act adopts a top to bottom approach in the privatization process as opposed to a bottom to top approach. It is argued that since the consumers of the public services are at the bottom of the pyramid, so to speak, then it is only fair that the input and interests of such citizens be incorporated in the Act with a view to accommodating the same from the onset of the privatization. Suggestions for the appropriate measures will be discussed further in the next chapter of this paper.

The Public Procurement and Disposal Act, 2005

The Public Procurement and Disposal Act²⁵⁶ (hereinafter PDA)) received presidential assent on 26th October 2006 but was to take effect upon notice by the relevant Minister. At the time of writing this paper that notice is yet to be issued and the Act is therefore not yet operational.²⁵⁷ In terms of functions, the Act will replace the Exchequer and Audit (Public Procurement) Regulations of 2001, which as we saw in Chapter 2 is and was the applicable legal framework during the contracting out of the services under discussion in this paper. Under the said Regulations the Minister has established a Public Procurement Complaints and Appeals Board (the Board). This legal framework was crafted as an interim measure pending the enactment of a law on public procurement as recommended by a team of consultants engaged by the Government of Kenya.²⁵⁸

The regulations were based on the UNCITRAL Model law²⁵⁹ and to a large measure embraced internationally benchmarked principles of sound public procurement.²⁶⁰ These regulations have been drawn by the United Nations

²⁵⁶ Act No. 3 of 2005

²⁵⁷ The reason for the delay has been due to the fact that the regulations to the Act are yet to be drawn and approved. This is according to information obtained from Mr. Richard Mwangi, the Chairman of the Public Procurement Complaints, Review and Appeals Board during an interview at his private offices at Nairobi Baptist Church Court off Ngong Road, Nairobi on 5th October 2006.

²⁵⁸ Ministry of Finance and Planning, *Report on the Diagnostic Survey, Findings and Recommendations on the Kenya Public Procurement Systems* 1999, 150-163.

²⁵⁹ The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, Official Records of the United Nations General Assembly, Forty-Ninth Session, Supplement No. 17(A/49/17).

²⁶⁰ See Sue Arrowsmith, National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict? in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 3 at 15 (Sue Arrowsmith and Arwel Davies, eds, London: Kluwer Law International, 1998) Arguing that a

Commission on International Trade Law and seek to streamline and set international benchmarks for public procurement and among other aspects establish open tendering as the preferred procurement procedure, require that specifications for the goods under tender be drawn objectively, prohibit the discrimination of candidates, mandate the advertisement and require the evaluation of tenders transparently and on the basis of objective criteria.²⁶¹ While the UNCITRAL regulations have proved extremely effective insofar as ensuring that those in the procurement process enjoy a high degree of procedural fairness in the public procurement process, it is argued that the rules do not extend this desirable quality to the individual citizen / consumer of the public services or goods under procurement. In other words the UNCITRAL regulations were essentially crafted with the public service procurer in mind and not vice-versa.

This weakness as we shall see shortly has been re-enacted into the PDA effectively ensuring that procedural fairness aspects of the individual citizen and consumer of the procured public services are effectively curtailed.

According to the PDA²⁶² its purpose is

“to establish procedures for the procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives-

- (a) to maximize economy and efficiency;**
- (b) to promote competition and ensure that competitors are treated fairly;**
- (c) to promote integrity and fairness of those procedures;**
- (d) to increase transparency and accountability in those procedures; and**
- (e) to increase public confidence in those procedures.**
- (f) To facilitate the promotion of local industry and economic development.**

From the above it is arguable that the PDA’s objectives are to a large extent compliant with international criteria for sound public procurement.

The PDA defines procurement as the

“acquisition by purchase, rental, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination”.

sound public procurement system should emphasize four principles, namely competition, publicity, use of commercial criteria and transparency.)

²⁶¹ UNCITRAL Model Law (n.40) above.

²⁶² Section 2 of the Public Procurement and Disposal Act, 2005.

Services in the PDA are defined as

“any objects of procurement or disposal other than works and goods and includes professional, non professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services”

This in essence would include the contracting out of public services by a public entity to a private entity as in the subject case study which would be acquisition by way of contractual means.

From a procedural fairness perspective the Public Procurement Complaints, Review and Appeals Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001²⁶³ will continue with an expanded mandate in addition to its current role of receiving complaints from bidders²⁶⁴ under the PDA as the Public Procurement Administrative Board.²⁶⁵ In essence the Act maintains a legal framework for Administrative Review of Procurement Proceedings with the aim of incorporating procedural fairness in the procurement of public services established by the current Regulations.

The Review Board’s main function currently is to adjudicate by way of administrative review over any complaints from “any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations”.²⁶⁶ The Board’s rules of procedure require aggrieved bidders to submit requests for administrative review to the Public Procurement Directorate.²⁶⁷ Herein lies the major weakness of the PDA from our earlier argument that it is essentially crafted to protect those participating in the bidding process. Indeed the board has explicitly stated this position in the case of **Kabage & Mwirigi Insurance Brokers vs. National Social Security Fund.**²⁶⁸ In that case the Board found that the tender process involving the award for the provision NSSF’s insurance was fatally flawed and annulled the tender in favour of Kabage and Mwirigi Insurance Brokers Limited. On appeal by the NSSF the Board stated that it is

²⁶³ Established vide Legal Notice No. 51/2001.

²⁶⁴ Section 93 of the Public Procurement and Disposal Act, 2005

²⁶⁵ Ibid Section 25

²⁶⁶ Ibid Section 93

²⁶⁷ This is the central organ for oversight of the public procurement process established under section 7 of the Procurement Regulations

²⁶⁸ PPCRAB Application No. 21/2003.

established as “an administrative review board specifically mandated **to deal with complaints submitted by bidders, not procuring entities.** (Emphasis mine) In the circumstances it is clear that the review contemplated in the Regulations is a review strictly confined to a complaint by a participant in the bidding process against the procuring entity and not from any other party who may nevertheless have a stake in the whole procurement process. According to the Board “upon the issuance of its decision in respect of an appeal complaint, the Board becomes *functus officio*.”

This position clearly does not afford the individual citizen with an avenue to question the procurement of public services which may be contracted out by a public entity even though they may be directly interested in the outcome of the contracting out process.

The Regulations apply to all “public entities” and supersede all previous government circulars and other instruments dealing with procurement²⁶⁹ and also provide for the administrative review of procurement decisions, which form a critical part of the efforts to ensure transparency in the procurement process.²⁷⁰

It is submitted that the mandate of the PDA should be expanded to cater procedural fairness for the interests of citizens who are able to establish a sufficient interest in the outcome of the whole public procurement process and not just to participants in the bidding process. Suggestions in line with this argument will be tendered in the next chapter and should be supplemental to the proposed expanded mandate which will cover adjudication in the areas of Debarments,²⁷¹ Orders of the Director-General²⁷² and Disposal Orders by the Director –General.²⁷³

The Public Procurement Complaints, Review and Appeals Board’s Record from a Procedural Fairness Perspective:

Brief History:

Following the recommendations of a team of consultants²⁷⁴ the Government of Kenya enacted the Exchequer and Audit (Public Procurement) Regulations in 2001.²⁷⁵The

²⁶⁹ See J.M. Migai Akech, “*Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid.*” 37 NYU Journal of International Law & Politics, New York 2005,15

²⁷⁰ Ibid 16

²⁷¹ Ibid Section 115

²⁷² Ibid Section 105

²⁷³ Ibid Sections 105 and 132

²⁷⁴ Ministry of Finance and Planning, *Report on the Diagnostic Survey, Findings and Recommendations on the Kenya Procurement Systems (1999).*

²⁷⁵ The Exchequer and Audit (Public Procurement) Regulations, 2001 Legal Notice No. 51 of 2001.

Regulations sought to streamline the procurement process by abolishing the Central Tender Board and establishing the Public Procurement Directorate as the central organ to oversee the public procurement process.²⁷⁶ The Regulations also provide for the administrative review of procurement decisions which as we have just seen constitute a fundamental pillar in the whole area of accountability and transparency.²⁷⁷ Apart from exposing corrupt practices in the procurement process, the Board has also done a good job of ensuring that procuring entities adhere to the Regulations and is developing sound jurisprudence on public procurement.²⁷⁸ Indeed, the Board has been noted to be unique in many respects compared to Kenya's other regulatory and administrative bodies, a factor which has largely been attributed to effective private sector representation among other factors.²⁷⁹ This is clear from the rulings of the Board in a number of cases where it has pointed out that transparency and accountability must be the leading criteria in the public procurement process.²⁸⁰ With regard to the contracting out of public services to private entities it is clear that the Act deals exclusively with the procurement of services by public entities.²⁸¹ A procuring entity is defined as "a public entity" which in essence means that a public entity that assumes the status of a private entity through some legal means is strictly speaking beyond the jurisdiction of the Act.

Indeed this was the main plank of the arguments put forward by the respondents in the case of **Monier 2000 Limited & 7 Others vs. The City Council of Nairobi & 2 Others** ²⁸² In that case the applicants who were in the advertising business commenced judicial review proceedings against the respondents who had awarded a contract for street lighting pole erection and advertisement to a Adopt- a- Light Limited which was a joint venture private company in which the Nairobi City Council was a minority shareholder holding 20% while Adopt-a –Light Limited held the remaining 80% of the shareholding in the said company. The award of the said contract was done in contravention of statutory provisions in respect to public procurement. The respondents argued that the joint venture company created by the

²⁷⁶ J.M. Migai Akech, n.(269) above 15

²⁷⁷ Ibid,17

²⁷⁸ Migai Akech (n.43) above, 19.

²⁷⁹ Ibid, 18

²⁸⁰ See for example CNC/ZTC/Kensim (Taifacom Limited) v. Communications Commission of Kenya, PPCRAB Application No. 30/2004 and Siemens Limited v. Kenya Power & Lighting Company Limited, PPCRAB Application No.19/2004.

²⁸¹ See Preamble to the Act and Section 4 of the Public Procurement and Disposal Act.

²⁸² High Court Miscellaneous Civil Application No. 1406 of 2004

said arrangement was not a public entity but a private one hence its procurement was not subject to the provisions of The Exchequer and Audit (Public Procurement) Regulations of 2001. Although the High Court's decision insofar as the whole application for judicial review in the said case was in favour of the applicants, it did not, unfortunately make any clear ruling on the issue of whether such an entity was bound by the said statutory provisions.

The jurisprudence of the Public Procurement Complaints and Review Board on this issue has, happily however, been markedly clear. As long as the procurement by the entity in question, in whatever capacity, involves the use of public funds then such procurement is bound by the Public Procurement Regulations²⁸³ and by extension the procedural fairness provisions of the said Regulations. This in our view is a good foundation upon which courts should extract and expand their jurisprudence in respect to issues of procedural fairness where contracting out of public services by public entities is involved. The Courts should ultimately be seen to be at the forefront of ensuring that the interests of the public are of primary consideration when issues of procedural fairness are at stake in the process of contracting out.

This should be the case even where it is possible for a public entity to factually prove the non-expenditure of public funds in the contracting out under the Court's scrutiny. In other words the issue of the greater public interest and whether the contracting out has taken into consideration the same should be the hallmark in ensuring that procedural fairness has been observed during both the process and outcome of the said contracting out.

Secondly and more importantly the restriction by the Act only to persons who have submitted a tender to a procuring entity ("candidates") effectively ensures that other stakeholders of a public service under procurement are denied access to the procedural fairness provisions in the Act. In other words an individual citizen who is aggrieved by the contracting out of a public service by a public entity has no *locus standi* under the Act if he has not presented a bid for the services under procurement. This is notwithstanding the fact that he may have a bigger stake in the outcome of the procurement process than the bidders themselves. Indeed what is clear from the Act is that the procedural fairness provisions under the Act are exclusively designed for the players in the bidding process as opposed to the individual citizen who is also a stakeholder in the outcome of the procurement process, in this case by the contracting

²⁸³ See PPCRAB Application No. 6/2006 Prima Pest & Bins Investment Company Limited & Another vs. Municipal Council of Mombasa & Mombasa Solid Waste Management Company Limited

out of a service by a public entity to a private entity. In our view it is essential for adequate legislative²⁸⁴ provisions to ensure that the interests of individual citizens are taken into consideration during the whole process of contracting out of public services and not just the interests of bidders for the provision of the said services, as is primarily the case as we have just seen. We shall look at detailed suggestions as to how such steps may be implemented from a practical point in the next chapter.

CONCLUSION:

We have seen from the foregoing chapter that The Privatization Act, 2005 and The Public Procurement and Disposal Act, 2005 are intended to constitute the fundamental legal framework for the contracting out of public services to private entities in Kenya.

From a procedural fairness aspect we have seen that the legislation under critique does to a large extent contain legal provisions that generally ensure transparency and accountability in the process of contracting out of public services to private entities. These provisions are however in their very nature largely crafted to extend protection to those bidding for the services being contracted out and not to persons who are not involved in the bidding process irrespective of the interest such individual citizens may be impacted upon by the outcome of the contracting out process.

The legislation in question ultimately involves the exercise of administrative decisions that affects individual rights or interests. In the circumstances procedural fairness requires that if such legislation is to be effective then it should incorporate aspects of participation by those affected by such administrative decisions in addition to a defined form of adjudicative procedure. In the event that interests of the general

²⁸⁴ This is particularly acute in view of Section 104(4) of the PDA which seems to imply that the jurisdiction of the High Court with regard to judicial review is ousted if it does not pronounce its findings in an application for judicial review within a period of thirty days from the date of filing such an application.

public or groups of people are affected then procedural fairness further requires a forum for public hearing and consultation.²⁸⁵

On the basis of this criteria we find that although the existing Kenyan legislation with regard to the contracting out of public services does to a certain extent provide for procedural fairness to persons participating in the bidding for the services being contracted out, the same cannot be said for persons who are out of the contracting process but who may nevertheless be affected by and have an interest in the outcome of the process. To that extent therefore, it can be deduced that insofar as procedural fairness requires that participation should take a modified form of adjudicative procedure then the existing legal provisions do to a large measure provide for the same. However, to the extent that procedural fairness demands a fair public hearing, consultation and general participation where general interests of a community or groups of people are concerned then the same cannot be said of the legislation in that respect.

²⁸⁵ See Galligan (n.21) above

CHAPTER FOUR

Conclusion and Recommendations

Conclusion:

In this paper we have examined the jurisprudential basis for procedural fairness and the way in which procedural fairness provides avenues for redress to members of the public where services are provided directly by public entities. We also saw the wider role of procedural fairness in maintaining public accountability for services and in improving public administration.

The paper also discussed the public law remedies with the rights that members of the public may have under the general law where they are concerned about or affected by the actions of public bodies.

The paper established that members of the public may find that as a result of contracting out they no longer have access to procedural fairness based remedies (administrative law remedies) currently available to that system of law and that existing private law remedies may not fill this gap. We also saw that the processes of Ministerial responsibility and Parliamentary accountability described in Chapter Two do not always provide a suitable avenue of redress for the individual affected by public entities hence the introduction of procedural law fairness to secure redress for individuals who may be affected by the actions of public entities.

In essence procedural fairness and its associated remedies provide two essential purposes. First, it ensures that individual member of the public are treated fairly, lawfully, rationally, openly and efficiently by public bodies. Secondly, it enhances and complements other mechanisms of public accountability as discussed in Chapter two.

Thus, procedural fairness plays a unique role in maintaining public accountability. It ensures that a public administrative body is accountable to an individual in respect to an individual of its decisions that affect that person. It also improves the whole system of government decision making by increasing its openness and transparency.

Juxtaposed with the foregoing, our analysis of the case study in Chapter Two revealed that the contracting out arrangements falls short of these two cardinal goals of procedural fairness. Public accountability deficits are evident from an analysis of the

contractual arrangements in the case study in that principles of procedural fairness were brazenly circumvented and perhaps more frighteningly a situation is engendered whereby public law functions have been ousted from the purview of public law by the contractual arrangements in the case study. Lastly, we saw that the contracting out as in the case study can effectively put the activities of public entities largely beyond the reach of traditional forms of political control by shifting the aspect of accountability to private entities and which position is not tenable with the principles of good governance in democratic societies.

With regard to the existing Kenyan legislation that flagships the contracting out process of public services, namely the Privatization Act²⁸⁶ and The Public Procurement and Disposal Act,²⁸⁷ we established that the while the legislation does to an extent contain legal provisions that generally ensure transparency and accountability in the contracting out of public services, the legislation is by its very nature crafted with the adjudicative aspect of procedural fairness with respect to the interests of the participating bidders for the services in mind. The legislation does not accommodate the equally important public participatory aspect of the privatization process. This is evident from the fact that the legislation's mandate only crystallizes with the conclusion of the process, and not from the inception of the process. There are no provisions in the legislation to accommodate ways and means of participation by those affected by the contracting out process, and who happen to be out of the bidding process for the contracting out of those services. This in our view is critical because more often than not, the greatest numbers of consumers of the services being contracted out are the ones whom are unlikely to participate in the bidding process for the provision of those services. The result is that a large constituency within the society may be left vulnerable to the negative effects engendered by deficits in procedural fairness that we have just established, and as direct result of contracting out of such public services to private entities.

In essence therefore, we see that when public services are contracted out, neither existing public law nor private law remedies may be adequate to solve the problems that may be experienced by public service recipients or other members of the public who may be affected by the action of contracting out. Secondly in the absence of sufficient legal mechanisms there is a potential loss of accountability where procedural fairness is not available and private law remedies may not fill that void.

²⁸⁶ Privatization Act,2005

²⁸⁷ Public Procurement and Disposal Act,2005

Lastly, no regulatory oversight on the part of private actors involved in the provision of privatized public services is provided for under the legislation. In such circumstances service recipients may find it difficult to monitor or ensure that the private actors provide the privatized services pursuant to the interests of the public. The benefits of procedural fairness, not only for individuals but also for the public in general, may be lost unless they are extended by appropriate legislation, legal jurisprudence and policy together with the enhanced use of private law remedies.

Recommendations:

Future prognosis on the privatization process:

A reading of the Kenyan Government's policy²⁸⁸ on privatization as read together with The Privatization Act, 2005²⁸⁹ indicates that the ultimate purpose of privatization is to develop the provision of modern, high quality, efficient, responsive and customer-focused range of services to the citizens. This will be attained by a deliberative policy of off-loading functions traditionally performed by public entities to non-public entities.²⁹⁰ In the circumstances the issue at hand is not whether there will be continuity in the privatization of public entities and services but rather a question of the face that process will adopt. It is on the basis of that premise that we make our recommendations on the process. Secondly the policies and existing legislation recognizes that various approaches may be adopted towards attaining the above-mentioned goals.²⁹¹

Market Testing:

From the foregoing, it is evident that as long as the stated objectives are met, the means by which they may be attained may not necessarily be through one specific model. We are therefore of the view that it should be obligatory on the part of public entities to market test the proposed model of contracting out of a given public function with a view to establishing whether the same can offer better value for money in terms of the quality of services and optimal costs. In this regard the public

²⁸⁸ See Republic of Kenya, Policy Paper on Public Enterprise and Privatization (1992).

²⁸⁹ Section 18

²⁹⁰ Supra (n.3 above).

²⁹¹ For example Section 25 of The Privatization Act, 2005 recognizes various modes of the privatization process ranging from public offering of shares, concessions, leases, management contracts, public-private partnerships, negotiated sales, sale of assets and any other method as shall be approved by the Cabinet.

entity may be in a position to exercise the best option available for purposes of transferring a given public function to a third party. It may in the process for example turn out that a restructuring of the service provision by the public entity may be a better option to contracting out the service.²⁹² However, invariably there will be instances when contracting out will prove to be feasible and it is against such instances that we shall focus our recommendations to.

Involving consumers of the public service being contracted out:

One of the cardinal requirements when a public entity is transferring its functions to a private entity is the need to maintain high standards of disclosure. Privatization, whether done through concessioning, contracting out, or an outright sale works better when the public and the media are provided with full information at every stage.²⁹³

Service recipients or consumer groups could contribute to the process of accurately defining the services to be provided and the way in which this will be done and assessed. The insights and experiences of service recipients whether obtained directly or through consumer groups will assist public bodies in defining the quality and standards required of contractors. Thus the Privatization Act should be amended to incorporate mandatory provisions for a public entity contracting out its services to develop mechanisms for obtaining information from the service recipients, either directly or indirectly or through public groups or consumer organizations which can be used in defining the service.

Insofar as procedural fairness is concerned in the contracting out service is concerned legislation under the Privatization Act should be provide individual citizens with the right to challenge the contracting out of a public service on the basis that their views on the contracting out as spelt out above have not been canvassed.

Legislation:

In addition fresh legislation should be enacted to provide for decisions made in exercise of powers conferred administrative bodies such as the Privatization Appeals Tribunal and the Public Procurement Administrative Review Board to be reviewable,

²⁹² See Heracleous (n.4) above arguing that by applying strategic market-testing principles Singapore Telecom has evolved into a world-class performer notwithstanding the fact that it is a public entity having declined earlier calls for its privatization.

²⁹³ See Jaindi Kiseru, "Railway Concessioning: Where Silence is Not Always Golden" Daily Nation, 8th November 2006.

on their merits by a tribunal specially constituted to review the decisions of administrative tribunals. This is the process known as merits review. Merits review is the process by which an administrative decision of a public body is reviewed “on the merits”: that is the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision affirming, varying or setting aside the original decision- is made. Merits review is characterized by the capacity of the reviewing person or body to substitute their own decision for the of the original decision maker.²⁹⁴

In addition to circumventing the slow pace and bureaucracy of the formal courts such a tribunal will provide a pool of expertise and appropriate jurisprudence with regard to procedural fairness aspects in different fields of law.

The enactment of a Freedom of Information law would also spurn a culture of public accountability on the part of public entities as they put their services under the hands of private hands. The absence of such law “promotes corruption and poverty because it breeds a culture of secrecy and impunity”.²⁹⁵

Amendments to Existing Legislation:

As we established earlier in the paper, the Privatization Act²⁹⁶ and The Public Procurement and Disposal Act²⁹⁷ are and will in the foreseeable future play a flagship role in the privatization process in Kenya. In this regard amendments should be incorporated to provide for with regard to the former provisions for recipients of public services to challenge the contracting out process prior to its conclusion and to extend the time within an appeal may be lodged against the decision of the Commission to privatize a public function. The current period of five working days²⁹⁸ is in our view too brief to afford any meaningful recourse to an aggrieved citizen who is aggrieved by the privatization process particularly in view of the fact that the Act does not provide him with an opportunity to challenge the process prior to its determination by the Privatization Commission.

²⁹⁴ Administrative Review Council Report No. 42. “*The Contracting out of Government Services*” http://www.ag.gov.au/arca/arc42_contents.htm 3 last visited on 2nd November 2006.

²⁹⁵ See Alex Ndegwa, “*Keeping Public In the Dark Fuels Graft and Poverty*”, The Standard, 10th November 2006 quoting a report by a forum by the International Commission of Jurists lobbying for the enactment of the Freedom of Information Bill held at the Grand Regency Hotel in Nairobi on 9th November 2006(on file with the author).

²⁹⁶ Privatization Act, 2005.

²⁹⁷ Public Procurement and Disposal Act, 2005.

²⁹⁸ See rules 2(1) and (2) of the Second Schedule of The Privatization Act, 2005.

While the Public Procurement and Disposal Act, 2005 does contain elaborate provisions to ensure procedural fairness in the process of procurement of public services it is our view that the same provisions should be extended to cover individual citizens who are recipients of the public services under procurement and not just those bidding for the same as is the current position. More importantly though and in view of the clear need to constrain private service providers by mandatory procedures and rigorous oversight, we are of the view that the Privatization Commission established under the Privatization Act should be accorded more legislative powers to act as an oversight agency in respect to oversee and regulate the privatization of public services. In this regard the Commission will develop and acquire sufficient resources to hire and train personnel to oversee the quality and to ensure that public complaints emanating from the whole privatization process are adequately addressed. Secondly the Commission should put in place structures and processes that ensure optimal public participation where public services are under privatization. These could take the form of information dissemination, media awareness campaigns, public forums to receive views on the intended privatization and the scrutiny of all contracts in order to ensure that the interest of the public is given due consideration. The adjudicative role of the Privatization Appeals Tribunal that is currently designed for complaints to be entertained at the conclusion of privatization should be amended to allow the lodging of a complaint by any citizen once the intention to privatize a given public service is in the public domain. In other words the role of the Privatization Commission and the institutions established there under should be geared to ensure the establishment of accountability mechanisms designed to monitor the quality of the service provided by the private actors, provide access to decision-making by the public and ensure procedural fairness in the whole process.

Clear Definition of the Service and Standards of Service:

One of the main shortcomings of the contract as established in the case under study was the lack of a clear definition of the scope of the service to be undertaken together with the standards required on the part of the operator. As noted in Chapter three both the Public Procurement and Disposal Bill, 2005 and Privatization Act, 2005 respectively adopt the principle of competitive tendering and contracting out in line with internationally benchmarked requirements. Such steps are in our view important

in as they form a foundational basis upon which public entities are held accountable for their actions during the process of contracting out. It is our view that this same principle should be extended by enacting statutory requirements requiring a public entity to specify clearly the services to be delivered and to allocate precise responsibilities between such an entity and the contractor for delivery of the services. Secondly the legislation should specify the criteria upon which the contractor's performance is to be measured and monitored.

Statutory and Jurisprudential Innovation in the Area of Procedural Fairness Law:

As we have seen from the paper citizen and consumer interests are arguably poorly served by both private and public law governing contracted out public services. The consumer is prevented from suing the service provider in contract due to lack of privity of contract and or consideration. In public law the problem concerns the relative lack of accountability of private entities compared with public functions performing the functions directly. While it is arguable that judicial review of a private contractor's decisions may be possible on the basis that the body is exercising discretions as agent of a public authority, delegations of authority are rarely ever so complete as to imply an agency relationship.²⁹⁹

There is therefore a case for the expansion, by legislation, of the ambit of judicial review in cases where public functions have been contracted out to private entities. Such reform would bring the law governing private entities that are performing public functions in line with those laws applying to public service providers, in relation to whom citizens have traditionally had recourse to judicial review for the enforcement of individual rights.³⁰⁰ All such bodies would be under duties at common law to observe standards of legality, reasonableness, and procedural fairness in decision-making. For example in the case study Nairobi residents whose street lighting is publicly funded under contract with a private operator would have the same rights regarding the protection of legitimate expectations as enjoyed by citizens in the public sector. The common factor justifying judicial control would be the impact of

²⁹⁹ For example in the English case of **R vs. Servite and Wandsworth LBC, ex parte Goldsmith and Chatting (2001) LGR 55** Moses J rejected the argument Servite Houses (a private operator) was acting as agent, on the ground that statutory provisions barred a local authority from delegating its obligations. A similar position obtains in Kenya as seen from an analysis of the contract in Chapter two where we noted that statutory provisions under the Local Government Act Chapter 265 of the Laws of Kenya for example do not allow a local authority to delegate its revenue collection powers under section 148 to another party.

³⁰⁰ Vincent Jones P. n. (189) above 902.

decisions on the interests of individual citizens, and their significance for the interests of the public at large.

From a private law perspective, a different strategy for securing the increased accountability of private contractors for the exercise of “public power” may be through the creation, by legislation, of private rights on the part of consumers and other affected citizens.³⁰¹ This approach suggests that the administrative law goals of increasing public accountability may be achieved by means other than public law. For example, in addition to providing enforceable substantive rights to certain standards of service, contract may also be the basis of procedural law protection in the form of duties of fairness, considerate decision-making and good faith.³⁰² Under this proposal it is argued that the doctrine of privity of contract is established by the fact that the parties and consumers linked to the contracting out are linked by dint of membership of a “complex economic organization”³⁰³

Extending and applying this analysis in the case study, street lighting might be considered as an example of such a complex economic organization, entailing the creation and maintenance of definite relationships between the private operator, the contracting public body and the individual service recipient for the furtherance of policy purposes. On this line of reasoning the citizen as the recipient of the public service would be able to sue either the public entity contracting out the service or the private provider of the services contracted out to enforce the terms of the contract between them, while either of the principal contracting parties may be able to rely on contract in response to the citizen’s action.

However, it should be borne in mind that legal or doctrinal development of whatever kind can only be part of an overall solution to contemporary governance issues. The attainment of improved redress for public service recipients, and increased accountability of private contractors and other parties performing public service functions, requires the careful tailoring of remedies to fit the conditions prevailing in a given situation as opposed to a template approach for all situations.

³⁰¹ Allars M. “*Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises*” (1995)6 Public Law Review 44

³⁰² See Freeman J, “*The Private Role in Public Governance*” (2000)75 New York University Law Review 543,589 arguing that in the United States the courts have shown an eagerness to adopt this approach in expanding their jurisprudence on issues relating to citizens’ access of public goods.

³⁰³ Collins H, “*Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*”(1990)53 MLR 731,744

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